TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 129.

THE COUNTY COMMISSIONERS OF WICOMICO COUNTY, PETITIONERS,

vs.

SAMUEL BANCROFT, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FOURTH CIRCUIT.

PETITION FOR CERTIORARI FILED OCTOBER 17, 1905.
CERTIORARI AND RETURN FILED JANUARY 31, 1906.

(19,926.)

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TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, } to-wit:

At a Circuit Court of the United States for the District of Maryland, begun and held at the court house in the city of Baltimore on the first Monday of April, being the sixth day of the same month, in the year of our Lord one thousand nine hundred and three.

Present: The Honorable THOMAS J. MORRIS, Judge of the Maryland District; JOHN C. ROSE, Esq., Attorney; JOHN F. LANGHAMMER, Esq., Marshal; JAMES W. CHEW, Clerk.

Among other were the following proceedings, to-wit:

Samuel Bancroft, Jr., Complainant,
versus
The County Commissioners of Wicomico County, a corporation created and existing under the laws of the State of Maryland; Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Weatherly, Defendants.

BILL OF COMPLAINT.

(2) Filed August 2, 1901.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MARYLAND. IN EQUITY.

Samuel Bancroft, Jr.,
vs.
The County Commissioners of Wicomico County, Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn, Levin B. Wertherly.

To the Honorable the Judges of the Circuit Court of the United States in and for the District of Maryland:

Samuel Bancroft, Jr., a citizen of the State of Delaware and a resident and inhabitant of the District of Delaware,

brings his bill of complaint, not only on his own behalf, but for the benefit of all others in like case who may come in and contribute to the expenses of this litigation, against the County Commissioners of Wicimico county, a corporation created and existing under the laws of the State of Maryland and a citizen of said State and a resident and inhabitant of the District of Maryland, and against Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Wertherly, all citizens of the State of Maryland, and residents and inhabitants of the District of Maryland, and thereupon your orator complains and says:

(3) I.

That your orator is a citizen of the State of Delaware and a resident and inhabitant of the District of Delaware, and that the defendant, the County Commissioners of Wicomico county, is a body corporate, incorporated by and existing under the laws of the State of Maryland, and a citizen of the State of Maryland & a resident & inhabitant of the District of Maryland, and that the said defendant, Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Wertherly, are all citizens of the State of Maryland and residents and inhabitants of the District of Maryland, and that the said last named individual defendants are the persons constituting the Board of County Commissioners of Wicomico county, having been thereto duly elected and qualified.

II.

That on or about the 27th day of February, in the year 1886, the Baltimore and Eastern Shore Railroad Company was duly incorporated under the provisions of an Act of the General Assembly of Maryland, and passed at the January session, 1876, Chapter 242, entitled, "An Act to provide for the creation and regulation of incorporated companies in the State of Maryland," for the purpose of building and maintaining a railroad between a point on the Eastern Bay, in Talbot county, and the town of Salisbury, in Wicomico.

III.

That thereafter, at the January session of the year 1886, the State of Maryland passed an Act, Chapter 133, entitled, "An Act to extend the privileges and enlarge the powers of the Baltimore and Eastern Shore Railroad Company, incorporated under the general laws in this State.

(4) That the first section of said Act ratified and confirmed the powers acquired by that railroad under its said certificate of incorporation and authorized it to "construct and operate branch roads, to lease, buy and improve lands for pleasure resorts along the line of their road; to lease, buy and build wharves, houses and shops for corporate purposes; to charter, purchase and hold steamboats and barges to ply in connection with their railroad to any port or ports, place or places whatsover, and to contract with the owners of any steamboat or other railroad company for the transportation of freights and passengers to and from any such railroads or steamboats."

That said Act further provides as follows:

Section 2. "That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all State, county or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the termini mentioned in its charter."

Section 4. "That said Baltimore and Eastern Shore Railroad Company aforesaid shall have power to unite, connect and consolidate with any railroad company or companies either in or out of this State, so that the capital stock of said companies (5) so united, connected and consolidated (respectively) may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the proprty, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters."

Section 5. "That the Baltimore and Eastern Shore Railroad Company shall have power to lease or purchase and operate any railroad or railroads either in or out of this State, for the purpose of carrying on their business, and any other railroad company in this State shall have the right to lease or sell its railroad or other property to the said Baltimore and Eastern Shore Railroad Company."

And this complainant prays leave to refer to the said Chapter 133 of the Acts of the State of Maryland of 1886 as fully as if the said Act were herein set out at length.

IV.

And this complainant is advised, and therefore avers, that it is the clear intent of the said Chapter 133 that not only the line of railroad between Eastern Bay and the town of Salisbury

should be exempt from taxation for the period of thirty years from the completion of the said road between the termini mentioned in the charter, but that said exemption should also apply to all railroads and their property which the said Baltimore and Eastern Shore Railroad Company should purchase or with which it should consolidate, because the said section 4 expressly (6) provides that the capital stock of the companies so consolidated "may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters," and that the effect of said act is to give the capital stock of the consolidated company all the immunities possessed by all or any of said companies so consolidated, and that it was not, therefore, the intention of the Legislature to limit the said exemption from taxation to the said line of road between Eastern Bay and Salisbury.

And this complainant further avers that at the time said Chapter 133 of the Acts of 1886 was passed there were no adequate east and west railroad facilities for Worcester county, Wicomico county, Dorchester county and Talbot county, and the various towns situate therein, through which the said Baltimore and Eastern Shore railroad was constructed; and that while certain of said counties had some short branch railroads running in a southwesterly direction from the New York, Philadelphia and Norfolk railroad, which railroad was controlled by the Pennsylvania railroad, the points to which said branch roads ran, and where steamboat connection was made for Baltimore, compelled a long carry by said steamboats, and the natural tendency of freight and passengers was to the city of Wilmington, in the State of Delaware, and the city of Philadelphia, in the State of Pennsylvania.

(7) That by reason of the construction of the said Baltimore and Eastern Shore Railroad, the carry by steamboat from Claibourne on the Eastern Bay to the city of Baltimore is only about forty miles, and the whole distance by said route from said town of Salisbury to the city of Baltimore is about one hundred miles, while the distance by rail from Salisbury to Baltimore by way of Wilmington is about one hundred and eighty miles; and this complainant is advised and believes, and therefore avers, that the said Chapter 133 of the Acts of 1886 was passed and the said tax exemption and powers given to the said Baltimore and Eastern Shore Railroad Company for the beneficial public purpose of giving said counties and said towns adequate eastern and western railroad facilities, for promoting the growth

and development not only of the counties and towns through which said railroad was to pass on the route set out in its certificate of incorporation, but also those through which any railroad thereafter purchased by it might run, and by the construction and purchase of said roads also induce, conserve and increase the traffic and communication between said counties and towns and the city of Baltimore, the largest and most important city in the State of Maryland, which said traffic at the time said Act was passed went largely to said cities of Wilmington and Philadelphia on account of the lack of suitable means of communication between said counties and towns and the city of Baltimore.

(8) V.

That on or about the 30th day of June, in the year 1890, the Baltimore and Eastern Shore Railroad Company, by virtue of the powers contained in said Chapter 133 of the Acts of 1886, purchased and acquired all the property, assets, rights and franchises of the Wicomico and Pocomoke Railroad Company, a corporation of the State of Maryland, and operating its road between the said town of Ocean City, in Worcester county, and the town of Salisbury, in Wicomico county, and that thereupon the said Wicomico and Pocomoke Railroad Company was conveyed to the said Baltimore and Eastern Shore Railroad Company by a duly acknowledged and recorded deed.

VI.

That the said Baltimore and Eastern Shore Railroad Company duly accepted the provisions of the said Chapter 133 of the Acts of 1886, and proceeded to construct and operate its road and purchased the property constituting the said Wicomico and Pocomoke Railroad Company upon the faith thereof, and the said Chapter 133 of the Acts of 1886 became a contract between the State of Maryland and the railroad company, its successors and assigns.

That by a deed of trust dated the 1st day of July, in the year 1890, and a supplemental deed of trust, dated ——, 1892, both whereof were duly executed, delivered and recorded, the said Baltimore and Eastern Shore Railroad Company conveyed all and singular its property, franchises, rights, privi-
(9) leges and immunities, including therein all the railroad and other property, franchises, &c., formerly belonging to the said Wicomico and Pocomoke Railroad Company to the Atlantic Trust Company, in trust, to secure the payment of the princi-

pal and interest of $1,600,000 of bonds in said mortgage or deed of trust mentioned, printed copies of which said mortgages or deeds of trust are herewith filed as part hereof, marked "Complainant's Exhibit Nos. 2 & 3," and the said bonds were duly executed and issued; and the complainant is informed, and avers, that the said bonds were issued by the said railroad company and purchased by the holders thereof upon the faith of the exemption from taxation given by the said Chapter 133 of the Acts of 1886, as well as upon the security of the property and assets conveyed by said two mortgages or deeds of trust.

VII.

That in the month of August, in the year 1894, a sale was made of all the railroads and property in said mortgage mentioned, together with all the rights, privileges, franchises and immunities of the Baltimore and Eastern Shore Railroad Company, and including the railroad formerly belonging to the Wicomico and Pocomoke Railroad Company, as aforesaid, which said sale was made under a decree of foreclosure and sale passed by this honorable court in a cause pending herein, wherein the Scranton Steel Company and the Atlantic Trust Company were complaints and the Baltimore and Eastern Shore Railroad Company was defendant.

(10) VIII.

That at said sale Nichoias P. Bond became the purchaser of all the said railroads and other property, rights, privileges, franchises and immunities then and there sold, or belonging or appertaining to the said Baltimore and Eastern Shore Railroad Company, Wicomico and Pocomoke Railroad Company, or either of them, or to the property so purchased, which said sale was afterwards duly ratified and confirmed by this court; and this complainant prays leave at the hearing of this case to refer to the proceedings in the said cause of the Scranton Steel Company and the Atlantic Trust Company against the Baltimore and Eastern Shore Railroad Company as fully as if the same were set out at length herein.

IX.

That after the ratification and confirmation of said sale the said Nicholas P. Bond, together with certain associates, under by virtue of Sections 187, 188, 189 and 190 of Article 23 of the Code of Public General Laws of the Stae of Maryland,

did form a corporation for the purpose of owning, possessing, maintaining and operating such railroad under the name of "The Baltimore, Chesapeake & Atlantic Railroad Company" by filing in the office of the Secretary of State of Maryland a certificate in the form required by Section 187 of Article 23 aforesaid a duly certified copy of which certificate is herewith filed as part hereof, marked "Complainant's Exhibit No. 4."

(11) X.

That said section 188 provides as follows:

"Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or h[illegible] railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this State, or the laws of any other State in which any part of such railroad may have been situated, not inconsistent with the laws of this State."

XI.

And this complainant is advised that by virtue of the said proceedings hereinbefore set out and the said provisions of the statute law of the State of Maryland the said Baltimore, Chesapeake and Atlantic Railway Company was duly incorporated and beame possessed of all the powers, franchises, rights, privileges and immunities belonging to or vested in the said Baltimore and Eastern Shore Railroad Company and the said Wicomico and Pocomoke Company as fully and to the same effect as if the legislature of the State of Maryland had granted the said powers, franchises, rights, privileges and immunities directly to the said Baltimore, Chesapeake & Atlantic Railway Company.

XII.

That on or about the 1st day of September, 1894, the said (12) Baltimore, Chesapeake & Atlantic Railway Company, a corporation duly formed as aforesaid, and possessing, as this complainant is advised and, therefore, avers, all the said powers, franchises, rights, privileges and immuniites formerly belonging to the said Baltimore and Eastern Shore Railroad Company and the said Wicomico and Pocomoke Company, duly executed and delivered to the Atlantic Trust Company a mortgage or

deed of trust to secure twelve hundred and fifty one thousand dollar bonds, and in and by said mortgage or deed of trust it conveyed to the said Atlantic Trust Company, as trustee, as security for said bonds and for the benefit of the holders thereof all its property of every kind and description, its rights, franchises, privileges and immunities, a printed copy of which said mortgage is herewith filed and marked "Complainant's Exhibit No. 5."

XIII.

That this complainant is informed and believes, and therefore avers, that the said bonds were purchased by the holders thereof, not only upon the security of the property actually conveyed by said mortgage and deed of trust, but also in reliance upon the provisions of the said Chapter 133 of the Acts of 1886, giving the said Baltimore and Eastern Shore Railroad Company the power and right to acquire and consolidate with other railroads, and exempting all of its franchises, property, shares of capital stock and bonds from all State, county and municipal taxation for the term of thirty years accounting from the 1st of August, 1891, the date when the said road was completed between the termini mentioned in its charter.

(13) XIV.

This complainant further avers that from the time of the formation of the said Baltimore, Chesapeake & Atlantic Railway Company down to the institution of the proceedings by the mayor and City Council of Ocean City, hereinafter referred to, no attempt had ever been made by the State of Maryland, the said mayor and City Council of Ocean City, or any other municipal corporation or county in the said State of Maryland, in which the said railway or any part thereof was situate, to levy or collect any taxes from the said railway company, but on the 14th day of February, 1898, the mayor and City Council of Ocean City, a municipal corporation of the State of Maryland, instituted proceedings in the Circuit Court for Worcester county, in said State of Maryland, for the purpose of collecting taxes, which it alleged had been recently lawfully levied and assessed for the year 1892, 1893, 1894, 1895 and 1896 against certain property of the said Baltimore, Chesapeake & Atlantic Railway Company, situate in said Ocean City, and that had formerly been part of the property of the said Wicomico and Pocomoke Railroad Company, and which was not part of the line of railroad between Eastern Bay and the town of Salis-

bury aforesaid; that the said railway denied the right of the said mayor and City Council of Ocean City to collect said taxes levied as aforesaid, and claimed that said property was exempt from taxation by virtue of said Chapter 133 of the Acts of 1886 and of the various matters and things hereinbefore set out in (14) regard to the incorporation and formation of the said railway company, and certain proceedings were thereupon had in said court. The said court ruled as a matter of law that the said property was not exempt from taxation, and on or about the 26th of October, 1886, a judgment was rendered in favor of the said mayor and City Council of Ocean City against the said railway company for the sum of $368.75; that the said railway company took an appeal to the Court of Appeals of the State of Maryland from the ruling and judgment of said court, and in due course said ruling and judgment were affirmed by the said Court of Appeals on the grounds: (1) That the exemption from taxation given by the said Chapter 133 of the Acts of 1886 applied only to the railroad and property mentioned in the said Act and to none other. (2) And that the said exemption did not pass under the reorganization proceedings of said Baltimore and Eastern Shore Railroad Company to the said Baltimore, Chesapeake & Atlantic Railway Company, as by reference to the case of Baltimore, Chesapeake and Atlantic Railway *vs.* Ocean City, reported in 89 Md., will fully appear; that thereupon the said Baltimore, Chesapeake & Atlantic Railway prayed for a writ of error to the Supreme Court of the United States, claiming that the said Chapter 133 of the Acts of 1886 constituted a contract between the State of Maryland and the Baltimore and Eastern Shore Railroad Company and its successors, and that the proceedings of the said mayor and City Council of Ocean City in assessing, levying and attempting to collect the (15) said taxes was an impairment of the said contract and was, therefore, in violation of the tenth section of the First Article of the Constitution of the United States forbidding the passage of any law impairing the obligation of contracts; that the said writ of error came on to be heard in the Supreme Court of the United States in or about the month of December, in the year 1900, and was by said court dismissed on the ground that it did not appear from the record of the said proceedings transmitted to said court that the point that the said assessing, levying and attempted collection of said taxes constituted an impairment of the contract made by Chapter 133 of the Acts of 1886 had been raised or decided in the court below, and that, therefore, the said Supreme Court of the United States had no jurisdiction.

XV.

And your orator now further shows that he is the owner and the holder of twenty of the twelve hundred and fifty one thousand dollar bonds mentioned in the 12th paragraph of this bill and secured by the deed of trust therein referred to.

XVI.

This complainant is informed and believes and, therefore, avers that the said defendants claiming to act as the County Commissioners of Wicomico county have levied and assessed and are about to attempt to collect taxes against the said property for (16) the year 1900 and also for the year 1901, and that the other counties or towns in which the line of railway and property of the said Baltimore, Chesapeake & Atlantic Railway passes or in which it is situate are about to assess, levy and attempt to collect taxes, not only against the said line of railway and property purchased from said Wicomico and Pocomoke Railway Company, but also against the railroad and property originally owned by the said Baltimore and Eastern Shore Railroad Company on the ground that under the said decision of the said Court of Appeals of the State of Maryland the said exemption from taxation did not pass to the said Baltimore, Chesapeake & Atlantic Railway Company by virtue of the said sale under the decree and order of this honorable court in the proceedings of the Atlantic Trust Company and the Scranton Steel Company against the Baltimore and Eastern Shore Railroad Company hereinbefore referred to in paragraph X. hereof, and the said proceedings for the reorganization and formation of said railway company under sections 187, 188, 189 and 190 of Article 23 aforesaid.

XVII.

This complainant is advised and, therefore, avers that by the acceptance by said Baltimore and Eastern Shore Railroad Company of the said chapter 133 of the acts of 1886, and the construction of its road as aforesaid, the said Chapter 133 of the Acts of 1886 became a contract between the said State of Maryland and the said Baltimore and Eastern Shore Railroad Com- (17) pany and its successors and that any law or ordinance passed by the State of Maryland or by any municipal corporation or any county of the said State, impairing the obligation of the said contract, is unlawful and void, because in violation of the tenth section of the First Article of the Constitution of the United States, forbidding the passage of any law impairing the

obligation of contracts, and that, therefore, the said proposed assessment, levying and collection of said taxes by the defendant against the said Baltimore, Chesapeake & Atlantic Railway Company and the ordinance or resolution passed by said defendant, under which said taxes are attempted to be enforced is null and void, because said ordinance or resolution and the threatened assessment, levying and collection of taxes as aforesaid will impair the obligation of the said contract made by the said Chapter 133 of the Acts of 1886.

XVIII.

That the levying and assessing and attempted collection of taxes upon the property pledged and mortaged to secure the bonds held by your orator and other bondholders will constitute an irreparable injury to the holders and owners of the said bonds, because the amount of said taxes will greatly increase the charges to be paid by the said railway company, thereby lessening its ability to pay your orator and others the interest upon the said bonds, and if the said taxes should not be paid by the (18) said railway company, the lien of the same, if they are allowed to be levied upon said property, will constitute a lien superior to the lien of the said mortgage upon the property of said railway, whereby title conveyed by said mortgage to the said property will be clouded and your orator and the other holders of the said bonds will be deprived of a portion of the security lawfully given by said mortgage and upon the faith of which said bonds were issued and purchased.

XIX.

And your orator further shows that the said Atlantic Trust Company, trustee under said mortgage deed of trust, is a citizen of the State of New York, and not within the jurisdiction of this honorable court, and he further shows that the said Atlantic Trust Company, as your orator is advised and believes, by the terms of said mortgage deed of trust has no power or authority vested in it to take proceedings in this behalf, or under said mortgage deed of trust, unless upon demand made by a majority of the holders of said bonds secured by said deed of trust, and that the said trust company, in fact, declines to proceed in this behalf unless requested so to do by a majority of the holders of said bonds, and your orator further shows that he is not himself the holder of a majority of said bonds and, therefore, cannot himself make the demand required by the said trust company, and he further shows that he has no knowledge or information

(19) as to who are in fact the holders of a majority of the bonds, nor any means of ascertaining who are such holders.

XX.

And your orator further shows that neither your orator, nor the said Atlantic Trust Company, trustee, nor any of the holders of the bonds secured by said mortgage were parties to the said suit of the mayor and City Council of Ocean City against the Baltimore, Chesapeake & Atlantic Railway Company and he is advised that therefore he is not in any way bound by the said decision of the Court of Appeals of Maryland.

XXI

That your orator is without adequate remedy at law and he is advised that he is entitled as well in his own behalf as in behalf of the holders of the said bonds secured by said mortgage of the first of September, 1894, who shall come into this case, to the aid and interposition of this honorable court in the premises, and to have the said defendant forever restrained and enjoined from in any manner assessing, levying or collecting any taxes against the said mortgaged property or threatening so to do.

XXII.

This complainant further shows that the matter in dispute, exclusive of interest and costs, is largely in excess of the sum of five thousand dollars.
(20)

To the end, therefore:

(1) That the said corporation, the County Commissioners of Wicomico county and the said Samuel P. Wilson, J Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Wertherly, by an injunction or order of this honorable court be forever restrained and enjoined from in any manner assessing, levying or collecting any taxes against the property, rights and franchises covered by or embraced in the said mortgage or deed of trust of September 1st, 1894, from the said Baltimore, Chesapeake and Atlantic Railway Company to secure bonds held by this complainant, or attempting or threatening so to do.

(2) That the complainant may have such other and further relief in the premises as its case may require.

May it please your honor to grant unto this complainant the writ of subpœna directed to the said County Commissioners of Wicomico county and the said Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Wertherly, commanding them to be and appear in this court at some certain day to be named therein, and answer the premises and abide by and perform such decree as may be passed therein.

And as in duty bound,

SAML. BANCROFT, JR,
NICHOLAS P. BOND,
Sol. for Complainant.

STEELE, SEMMES, CAREY & BOND,
of Counsel.

(21) UNITED STATES OF AMERICA,
State of Pennsylvania, Bedford County.

On this 30 day of July, 1901, before me, the subscriber, a notary public duly commissioned and qualified, resident in the county and State aforesaid, personally appeared Samuel Bancroft, Jr., who made affirmation in due form of law that he is the above named complainant, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge and belief.

Commission Ex. January, 1903.

[Notarial Seal.] JACOB REED, N. P.

SUBPŒNA.

(22) Issued August 2, 1901.

THE UNITED STATES OF AMERICA,
District of Maryland, to-wit:

To the County Commissioners of Wicomico county, Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Wertherly,—Greeting:

You are hereby commanded that all excuses and delays set aside you be and appear at the clerk's office of the Circuit Court of the United States for the Fourth Circuit in and for the District of Maryland, on the first Monday in September next, to answer unto the bill of complaint of Samuel Bancroft,

Jr., a citizen of the State of Delaware, in said court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the second day of August in the year of our Lord, 1901.

Issued second day of August, 1901.

JAS. W. CHEW, Clerk.

[The Seal of the Circuit Court, Maryland.]

Memorandum.

The defendants are required to enter their appearance in the suit in the clerk's office on or before the first Monday of September next, otherwise the bill may be taken *pro confesso*.

MARSHAL'S RETURN.

(23)

Summoned the County Commissioners of Wicomico county by service upon Samuel P. Wilson, president of the board, and copy of subpoena left with him.

Also summoned Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Wertherly, individually and copy of subpoena left with each of them this ninth day of August, 1901.

WILLIAM F. AIREY,
United States Marshal.

APPEARANCE FOR DEFENDANTS.

(24) Filed September 2, 1901.

IN THE CIRCUIT COURT OF THE UNITED STATES DISTRICT OF MARYLAND.

Samuel Bancroft, Jr., *vs.* The County Commissioners of Wicomico County, and Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert E. Coulbourne and Levin B. Weatherly.	No. 62, Eqty. D.

Jas. W. Chew, Esq., Clerk of the said Court:

Please enter my appearance for all the defendants in the above entitled cause and oblige.

JAS. E. ELLEGOOD,
Atty. for Defts.

DEMURRER TO BILL AND ORDER OVERRULING SAME.

(25) Filed September 26, 1901.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MARYLAND.

Samuel Bancroft
vs.
The County Commissioners of Wicomico County. } In Equity.

The defendant demurs to the plaintiff's bill in the foregoing cause and for cause of demurrer showeth:

1. That the said plaintiff has not in and by the said bill made or stated any cause as doth or ought to entitle him to any such relief as is thereby sought and prayed for against him.

2. Because the plaintiff hath no legal standing in this honorable court to file the said bill, and because the said court has no jurisdiction over either the defendant, or over the subject matter of litigation as set forth in said bill.

Wherefore, for divers other good cause of demurrer appearing in the said bill, this defendant demurs thereto, and humbly demands the judgment of this honorable court whether he shall be required to make further answer to the said bill, and prays to be hence dismissed.

JAS. E. ELLEGOOD,
Solicitor for Respondents.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JAS. E. ELLEGOOD,
Solc'tr. for Respondents.

(26) STATE OF MARYLAND,
Wicomico County, towit:

I hereby certify that on this twenty-fourth day of September, 1901, before me, the subscriber, a notary public of the said State, in and for the foregoing county, personally appeared Samuel P. Wilson, president, and on behalf of himself as one

of the defendants and on behalf of the County Commissioners of Wicomico county, and made oath in due form of law that the foregoing demurrer is not interposed for delay.

[Notarial Seal] F. LEONARD WAILES,
Notary Public.

For reasons stated in the opinion filed, the foregoing demurrer is hereby overruled. July 8, 1902.

THOS. J. MORRIS, Judge.

RULINGS OF COURT UPON DEMURRER TO BILL.

(27) Filed July 8, 1902.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Samuel Bancroft, Jr.,
vs.
The County Commissioners of Wico- County. } In Equity.

Defendant's Demurrer to the Bill of Complaint.

MORRIS, District Judge:

The defendants' counsel in his brief states that the grounds of the demurrer are that the court has no jurisdiction of the persons or of the subject matter involved.

The bill is filed by a citizen of Delaware who is the holder of $20,000 out of $1,251,000 of the mortgage bonds of the Baltimore, Chesapeake and Atlantic Railway Company. He alleges that the County Commissioners of Wicomico county, a corporation of Maryland, and the said commissioners, all citizens of Maryland, have levied and assessed and are about to attempt to collect taxes on the property of said railway company within said county, being part of the property purchased by the Baltimore & Eastern Shore Railroad Company from the (28) Wicomico and Pocomoke Railway Company, and which passed to the said Baltimore, Chesapeake and Atlantic Railway Company by a judicial sale under the foreclosure of a mortgage made by the said Baltimore and Eastern Shore Railroad Company.

The complainant avers that the said property, under the

provisions of the charter of the Baltimore and Eastern Shore Railroad Company, and other statutes of Maryland, is exempt from taxation and that the attempted levying, assessing and collection of taxes on the property pledged and mortgaged to secure the bonds held by the complainant, and other bondholders, will constitute an irreparable injury to said bondholders, and complainant prays an injunction to restrain the defendants from assessing, levying or collecting any taxes upon the mortgaged property. The complainant avers that the trustee under the mortgage deed by which his bonds are secured is a citizen of New York and not within the jurisdiction of the court, and that said trustee refuses to proceed in this behalf except upon conditions with which the complainant is unable to comply.

So far as the jurisdiction of this court depends upon diverse citizenship, the allegations are sufficient. And the averments with respect to the interest of the complainant and the alleged injury to his security for the payment of his bonds and of his inability to get the mortgage trustee to act all seems to me sufficient.

(29) It is a suit in equity in which there is a controversy between citizens of different states, and in which the matter in dispute exceeds $2,000, and all such controversies are within the jurisdiction of the circuit courts. Gaines vs. Fuentes, 92 U. S., 10-18.

The defendant contends that the interest of the complainant is too remote and contingent to enable him to maintain this bill. I think there is no doubt the trustee under the mortgage could maintain such a bill, and if the trustee refuses, then a beneficiary under the deed of trust can maintain it. A stockholder could file such a bill if the corporation refused to do so. Barnes vs. Koenegay, 62 Fed. Rep., 671; Chicago vs. Shelden, 9 Wall., 50.

The trustee could file such a bill. Baltimore Trust & Guarantee Company vs. The City of Baltimore, 64 Fed. Rep., 153; S. C. 166 U. S., 573.

If the court has jurisdiction because of divers citizenship, it does not seem worth while now to enter upon a consideration of the other ground of Federal jurisdiction urged by the complainant, namely, that the action of the Commissioners of Wicomico county in attempting by virtue of their authority derived from the State to impose a tax on property which the complainant claims is entitled to exemption from taxation by virtue of a

(30) contract between the Baltimore & Eastern Shore Railroad Company and the State is within the inhibition of section 10 of Article 1 of the Constitution, which declares that no State shall pass any law impairing the obligation of contracts.

It may be that the complainant has failed to point out by specific averments what subsequent legislative enactment of the State it is which it is claimed has impaired the obligation of the alleged contract, or what by-law or ordinance of the Commissioners of Wicomico county passed in the exercise of a power delegated by the legislature. Bacon vs. Texas, 163 U. S., 216; McCullough vs. Virginia, 172 U. S., 116; Lehigh Water Co. vs. Easton, 121 U. S., 338; Hanford vs. Davis, 163 U. S., 273; Hamilton Gas Co. vs. Hamilton, 146 U. S., 258; Central Land Co. vs. Laidley, 159 U. S., 103-109.

That question need not be considered under this demurrer and is not important as the court has jurisdiction upon the ground already stated.

The bill of complaint sets out very fully that in a suit brought by Ocean City against the complainant to recover simi-
(31) ly imposed taxes, which was carried by appeal to the Court of Appeals of Maryland (89 Md., page 89), it was held that the exemption from taxation granted to the Baltimore & Eastern Shore Railroad Company by the Act of 1886, Chapter 133, did not extend to the complainant, as the purchaser of the road under a judicial sale. Under the demurrer in this case it has been argued that the bill itself sets out a judgment adverse to the complainant's present contention, by which the complainant was bound so that upon the averments of the bill the matter in controversy is *res judicata*, and the complainant estopped.

I do not think it appears that complainant was a party to the above mentioned suit or bound by it.

In Keokuck and Western Railroad vs. Missouri, 152 U. S., 301-314-317, it was distinctly held in a quite similar case that a mortgagee is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the mortgage, unless he or his representative is a party to the litigation. Louisville Trust Co. vs. Cincinnati, 76 Fed. Rep., 296.

The question whether or not this court is controlled by the decision of the Court of Appeals of Maryland, reported in 89 Md., or would follow it, does not arise under the demurrer and is not considered.

It was urged by counsel for the defendants that by the Constitution of Maryland all charters of corporations may be altered or repealed, and that therefore there could be no irrepealable contract for exemption arising out of the charter granted to the Bal-
(32) timore & Eastern Shore Railroad Company. To this it is sufficient answer that there has been called to the attention of this court no law passed by the legislature altering or repealing the charter or the provisions with regard to exemption.

I think the demurrer must be overruled without passing upon any of the merits of the controversy.

ANSWER.

(33) Filed January 12, 1903.

IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF MARYLAND.

Samuel Bancroft, Jr., vs. County Commissioners of Wicomico County.	In Equity

To the Honorable, the Judge of said Court:

The answer of the County Commissioners of Wicomico county, and Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Weatherly, constituting the Board of County Commissioners of Wicomico county, at the time of filing the bill of complaint in the above cause, to the bill of complaint of Samuel Bancroft, Jr., against them exhibited.

The defendants, answering, say:

First. That they admit the matters and things stated in paragraphs I., II., III., V., IX., X., XV., XIX., XXII., to be correct, as stated, as far as the same may be material or pertinent to the issues.

Second. To paragraph IV., the defendants say that it is not the "clear intent" of Chapter 133, Acts of 1886, of Maryland, referred to in the said paragraph, that the exemption from taxation of the Baltimore and Eastern Shore Railroad should apply to all railroads and property which the said Baltimore and Eastern Shore Railroad should purchase or with which it should consolidate, but these respondents aver that it was the clear intent of the legislature to limit the said exemption to such of the property of the said company as it should acquire between the termini of the said railroad, *i. e.*, between Claiborne and Salis-
(34) bury, and only to such property as the said company should acquire on the line of the said road, proper and essential for the operation of the said railroad only.

Further answering the paragraph, these defendants cannot say what the railroad facilities for the counties and towns therein named were, or what the other means of transportation and facilities of travel were prior to the passage of the said Act, or what it was that entered into the minds of the legislators, but

they say that the same is immaterial and irrelevant to any issue in this cause. And these defendants further say that it would be against public policy, and the best interests of the State, to expand the immunity from taxation so as to include within its provisions all the property which the said company might or could have acquired under its enlarged charter powers, either by purchase or by consolidation, as its enlarged powers by the Act of Assembly referred to in the bill of complaint and quoted, enabled it "to buy and improve land for pleasure resorts * * * * buy and build wharves * * * * purchase and hold steamboats and barges * * * * to lease or purchase and operate any railroad or railroads, either in or out of the State." Therefore, by the interpretation sought to be given this statute, it could have acquired all the railroads and steamboats in the State, and had it all exempt from taxation both for State and county purposes; that it did as a matter of fact, not only buy the property of the Wicomico and Pocomoke Railroad, but the Baltimore, Chesapeake and Atlantic (35) Railway Company, owning the property of the said Baltimore and Eastern Shore Railroad, has since bought all the steamboats of the Maryland Steamboat Company and of the Eastern Shore Steamboat Company, besides buying and building others of its own, and claims that as a successor to the Baltimore and Eastern Shore Railroad, it is entitled to have all its property exempt from State and county taxation amounting to many hundreds and thousands of dollars, notwithstanding the fact that the property and franchises of the said Wicomico and Pocomoke Railroad and of the said Maryland Steamboat and the Eastern Shore Steamboat Companies were not exempt from taxation, but were subject to taxation and were taxed for State, county, and municipal purposes before this purchase, absorption, and consolidation by the aforesaid Baltimore, Chesapeake and Atlantic Railway Company.

Third. To paragraph VI., these defendants say that the original contract between the State of Maryland and the Baltimore and Eastern Shore Railroad Company was contained in the incorporation granted the said company under the general laws of the State, and contained no exemption from taxation, and that Chap. 133, Acts of 1886 of Maryland, enlarged its charter powers and granted certain exemption from taxation; but the same did not and could not become an irrepealable contract between the State and the said company, under the Constitution of the State of Maryland, Art. 3, sec. 48, to-wit: "All charters granted or adopted, in pursuance of this section and all (36) charters heretofore granted created, subject to repeal or

modification, may be amended from time to time, or may be repealed," which is made a part of this answer.

And these defendants say that if the said State has, in the exercise of its sovereign power, altered or amended the alleged contract and subjected the property of the said Baltimore and Eastern Shore Railroad Company to taxation, it has not thereby exceeded its powers so to do, or violated or impaired the said contract.

Further answering the said paragraph VI., these defendants say that the execution of deed of trust and the supplementary deed of trust therein referrer to and the issue of the bonds, as alleged in said paragraph, are immaterial in this case, and therefore need not be admitted or denied.

Fourth. As to paragraph VII., they admit the sale of the railroads and property, under a decree of foreclosure and sale as alleged in said paragraph, but deny that there was or could be a sale of "all the rights, privileges and immunities," that is to say, that the Baltimore and Eastern Shore Railroad Company did or could convey by way of mortgage or otherwise transfer , assign, or set over the immunities from taxation given by the State to the said Railroad Company, because the same was a personal privilege, conceded to the Baltimore and Eastern Shore Railroad Company.

Fifth. To paragraph VIII., these defendants admit the purchase of the said railroads and property by the said Nicholas (37) P. Bond, as alleged, but deny that he purchased "all the franchises, privileges, and immunities" belonging or appertaining to the said railroad companies, because the immunity from taxation was not and could not have been a subject of sale and transfer.

Sixth. To paragraph XI., these defendants say, that while they admit that the Baltimore, Chesapeake and Atlantic Railway Company was duly incorporated, they deny that it became possessed of "all the rights and privileges and immunities belonging to or vested in the Baltimore and Eastern Shore Railroad Company and the said Wicomico and Pocomoke Railroad Company as fully and completely and to the same extent as if the legislature of the State of Maryland had granted the said powers, franchises, rights, privileges and immunities to the Baltimore, Chesapeake and Atlantic Railway Company," because, as hereinbefore set forth, that while the exemption from taxation was a voluntary and personal gift from the State to the Baltimore and Eastern Shore Railroad, it has never been the

subject gift to the Baltimore, Chesapeake and Atlantic Railway Company, and was not transferrable or purchaseable.

Seventh. As to paragraph XII., these defendants say, conceding the execution and delivery to the Atlantic Trust Company of the mortgage or deed of trust therein alleged, yet they deny that the said Baltimore, Chesapeake and Atlantic Railway Company possessed or mortgaged any immunity from taxation of the property of the said railroad company.

(38) Eighth. As to paragraph XIII., they cannot say whether the holders of bonds relied upon the Chap. 133, Acts of 1886, and they are advised that it is not material to admit or deny the same, but they are advised that the holders of the said bonds, together with the Baltimore, Chesapeake and Atlantic Railway Company and the said Atlantic Trust Company had knowledge, or could have had knowledge, by slight inquiry, of the Constitution of the State, allowing the State to alter or amend the aforesaid charter, and revoke the alleged exemption, and therefore they could not have relied implicitly upon the Act of Assembly aforesaid.

Ninth. As to paragraph XIV., these defendants deny that no attempt has ever been made to levy or collect any taxes of the said Wicomico and Pocomoke Railroad Company prior to the years therein alleged, but they are informed and therefore aver, that the property of the said company had for many years been subject to taxation, and had been taxed from the time of its existence for State, county and municipal purposes, though they are informed that after its consolidation with the Baltimore and Eastern Shore Railroad, and after the acquisition of both said properties by the Baltimore, Chesapeake and Atlantic Railway, the latter company claimed that the exemption given, covered the property of the Wicomico and Pocomoke Railroad also, and to settle the question a suit was instituted in the Circuit Court for Worcester county by the Mayor and City Council (39) of Ocean City vs. The Baltimore, Chesapeake and Atlantic Railroad, and a judgment was rendered as alleged in said paragraph; and they admit that rulings of the court were made as therein alleged, and affirmed by the Court of Appeals as reported in 89 Md., 89, and that a writ of error was sued out to the Supreme Court of the United States, and that the same was dismissed upon the motion of the Mayor and Council; but they deny that it did not appear from the record of the proceedings, transmitted to the said court, that the point, that the said assessing, levying and attempted collection of the said taxes,

constituted an impairment of the said contract made by the Chap. 133, Acts of Assembly of 1886, had been raised or decided in the court below, and for that reason the said Supreme Court had no jurisdiction. On the contrary, the point was expressly made and argued before the court that the alleged taxation was an impairment of the contract, and therefore a violation; but the Supreme Court, while it gives no opinion, dismissed the writ on the following authorities: "Lehigh Water Co. *vs.* Easton, 121 U. S., 388; Central Land Co. *vs.* Laidly, 159 U. S., 103; Oxley Stave Co. *vs.* Butler Co., 166 U. S., 648; L. & N. R. R. Co. *vs.* Louisville, 166 U. S., 709; Ambro *vs.* U. S., 159 U. S., 695; Powell *vs.* Supervisors, &c., 150 U. S., 433," some of which cases show that the point was in the minds of the court in dismissing it for want of jurisdiction.

Tenth. Answering paragraph XVI., the defendants sued personally—*i. e,* Samuel P. Wilson et al., constituted at the time of the filing of the bill of complaint the Board of the (40) County Commissioners of Wicomico county, a body duly incorporated by the laws of Maryland, with power to assess such property as was liable to taxation and had been omitted from the assessment by the general assessors of said county. That the general assessors did, in pursuance of Chap. 120, Acts of Assembly of Maryland, passed 1896 (which the defendants pray may be taken as a part of this answer), make a general assessment of the property in the said county, but omitted to assess the property of the said Baltimore, Chesapeake and Atlantic Railway Company, and the said property was omitted from the assessment books and list of taxables of the said county until 1899 and no levy made thereupon. In 1899 the Board of County Commissioners of said county, as then constituted, [illegible]ng under the advice of legal counsel, gave notice to the said railroad company, in accordance with the statute in such case, made and provided, of the intention of the said commissioners to value and assess its property for State and county purposes. That in pursuance of said notice, the said company, through both its attorney and general superintendent, appeared before the said commissioners on the day appointed, and the value of the aforesaid property was then and there agreed upon by the said commissioners and the said officer and attorney, but the said attorney and supt. did not admit the liability to taxation, but claimed that the same was exempt. The said commissioners, however, assessed the said property at the valuation agreed upon and placed the same on the assessment books and in the (41) list of taxable property and levied taxes thereon for the years 1896, 1897, 1898 & 1899. But the said railroad

company declined to pay the taxes for the said years or for any of them. Whereupon the said County Commissioners brought suit for the same in the Circuit Court for Wicomico county and recovered judgment for the taxes for the year 1899, dated the ——— day of ———, 1900, upon the same property of the said company now claimed to be exempt by the complainant. The said railroad company, feeling *agrieved* at the said decision, appealed therefrom to the Court of Appeals of Maryland, to the January term, 1901, upon which appeal the said judgment was affirmed by the Court of Appeals and stands unreversed, and will be found in the 93rd Vol. of Maryland Reports of the Court of Appeals Decisions, page 113, et seq.

Further answering, the said defendants say they became successors to the County Commissioners aforesaid who had assessed and levied the taxes for 1899, and they found the property of the said railroad company already assessed upon the assessment books of the said county, and in casting up the assessable basis and list of taxables for taxation and levy to pay county and State taxes, they included the said property of the railroad company, and placed the same with the list of all other taxable property, both for State and county purposes, in the hands of the collector of taxes on the first day of August, both for the years 1900 and 1901.

(42) Eleventh. Answering paragraph XVII., these respondents say that whatever may have been the effect of Chap. 133, Acts 1886, of Maryland, as a contract between the State and the said company to exempt the property of the said railroad company, these defendants repeat that the same was not an irrepealable contract, as hereinbefore shown, and that the exemption thereby given was personal and not transferable, and therefore never came to or vested in the said Baltimore, Chesapeake and Atlantic Railway Company, and the property of the said company is not, by virtue of the said Act, exempt from taxation, and that the assessment and taxation of same is lawful and valid and not in violation of sec. 10, Art. 1 of the Constitution of the United States, and these defendants are advised that the assessment and levy of taxes as heretofore set forth are valid and legal and were in pursuance of the statute of said State, and the decisions of the highest court of this State, construing the said statute, and the effect thereof on the same, and the transfers, mortgages and conveyances referred to in the bill of complaint in this case.

Twelfth. Answering paragraph XVIII., the defendants say that the levying the taxes upon the property of the said ral-

way company does not constitute an irreparable injury to the holders of the bonds, as alleged, but they are advised that it is the duty of the said company, holding large and valuable franchises from the said State and large and valuable property, to bear its due proportion of the burdens of the State and county government.

(43) Thirteenth. Answering paragraph XX., the defendants say that while the complainant, nor the Atlantic Trust Company nor any of the holders of said bonds referred to, were not technically parties to the records in the matter of the suits hereinbefore referred to, yet they are in privity by contract with the said Baltimore, Chesapeake and Atlantic Railway Company and are bound by the said decisions, (1) because of such privity, and (2) because the decisions of the Court of Appeals are final and conclusive as to the construction of the Acts of Maryland and all rights accruing thereunder to the aforesaid parties.

Fourteenth. Answering paragraph XXI., the defendants say that this complainant is not without remedy, and that these defendants ought not *not* to be restrained and enjoined from assessing, levying and collecting taxes upon the property of the said railroad, because the said railroad company can defend itself and its aforesaid creditor, the complainant, in the courts of the State of Maryland in any suit that may be brought against it for the said taxes, and if the said assessment and taxation is a violation of the Constitution of the United States, then the said railway company has an adequate remedy by a writ of error to the United States Supreme Court.

And these defendants pray to be dismissed hence, with their reasonable costs, and as in duty bound, &c.

JAS. E. ELLEGOOD,
Solicitor for the Respondents

REPLICATION.

(44) Filed January 15, 1903.

IN THE CIRCUIT COURT OF THE U. S. DIST,. MD.

Samuel Bancroft, Jr.
vs.
The County Commissioners of Wicomico County

The replication of the complainant to the answer of said defendants:

This repliant, saving & reserving to himself all and all manner of benefit & advantage of exception to the manifold uncertainties & insufficiencies of said answer, for replication thereto, says that he will aver & prove his said bill to be true, certain & sufficient in law, and that he is ready to prove the same as this honorable court shall direct, and humbly prays as in & by said bill he has already prayed.

NICHOLAS P. BOND,
Sol. for Complainant.

AGREED STATEMENT OF FACTS.

(45) Filed January 15, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MARYLAND.

Samuel Bancroft, Jr.
vs.
County Commissioners of Wicomico County.

AGREED STATEMENT OF FACTS.

It is agreed by the plaintiff and defendants in the above cause, that at the hearing of the same, the court may consider the following facts as fully as if regularly and legally proven, and that all proper inferences of fact and law may be drawn by the court from the said facts as though regularly proven in court.

First. That the complainant is a citizen of the State of Delaware, and a resident and inhabitant of the District of Delaware and that the defendant, the County Commissioners of Wicomico county, is a body corporate, incorporated by and ex-

isting under the laws of the State of Maryland, a citizen of said State of Maryland and a resident and inhabitant of the District of Maryland, and that the said defendants, Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Wetherly, are all citizens of the State of Maryland, and residents and inhabitants of the District of Maryland, and that the said last named individual defendants are the persons consti-
(46) tuting the Board of County Commissioners of Wicomico county, having been thereto duly elected and qualified.

That on or about the 27th day of February, in the year eighteen hundred and eighty-six, the Baltimore and Eastern Shore Railroad Company was duly incorporated under the provisions of an Act of the General Assembly of Maryland and passed at the January session, eighteen hundred and seventy-six, Chapter 242, entitled "An Act to provide for the creation and regulation of incorporated companies in the State of Maryland," for the purpose of building and maintaining a railroad between a point on Eastern Bay in Talbot county, and the town of Salisbury in Wicomico.

That thereafter at the January session of the year eighteen hundred and eighty-six, the State of Maryland passed an Act, Chapter 133, entitled "An Act to extend the privileges and enlarge the powers of the Baltimore and Eastern Shore Railroad Company incorporated under the general laws in this State."

That the first section of said Act ratified and confirmed the powers acquired by that railroad under its said certificate of incorporation and authorized it to—

"Construct and operate branch roads, to lease, buy and improve lands for pleasure resorts along the line of their road, to lease, buy and build wharves, houses and shops for corporate purposes, to charter, purchase and hold steamboats and barges, to ply in connection with their railroad to any port or ports,
(47) place or places whatsoever, and to contract with the owners of any steamboat or other railway company for the transportation of freights and passengers to and from any such railroads or steamboats."

That said Act further provides as follows:

Section 2. "That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all State county or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the termini mentioned in its charter."

Section 4. "That the said Baltimore and Eastern Shore Railroad Company aforesaid, shall have power to unite, connect, and consolidate with any railroad company, or companies, either

in or out of this State, so that the capital stock of said companies so united, connected and consolidated (respectively), may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company, and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters."

Section 5. "That the Baltimore and Eastern Shore Railroad Company shall have power to lease and purchase and operate any railroad or railroads either in or out of this State, for (48) the purpose of carrying on their business, and any other railroad company in this State shall have the right to lease or sell its railroad or other property to the said Baltimore and Eastern Shore Railroad Company," and that the whole of said Act of Assembly may be considered by the court as fully as though offered in evidence.

Second. That the facts alleged in the fourth paragraph of of the bill of complaint are true as therein stated without prejudice to the right of the defendants to contend that the same are immaterial to the issues in this cause, and therefore inadmissible in evidence, and without prejudice to the right of the defendants to deny the effect and intent of the said Act of Assembly alleged in said paragraph.

Third. That on or about the 3rd of June, in the year 1890, the Baltimore and Eastern Shore Railroad Company, by virtue of the powers contained in said Chapter 133, of the Acts of eighteen hundred and eighty-six, purchased and acquired all the property, assets, rights and franchises formerly belonging to the Wicomico and Pocomoke Railroad Company, a corporation of the State of Maryland, operating a road between the town of Ocean City, in Worcester county, and the town of Salisbury, in Wicomico county, which property, assets, rights and franchises were then owned by the purchaser of the same at a sale under foreclosure of the mortgage executed by the said Wicomico and (49) Pocimoke Railroad Company, and that thereupon the said purchaser of the same at said mortgage sale conveyed all the property, assets, rights and franchises formerly belonging to the said Wicomico and Pocomoke Railroad Company to the said Baltimore and Eastern Shore Railroad Company by duly acknowledged and recorded deed.

Fourth. That the said Baltimore and Eastern Shore Railroad Company duly accepted the provisions of the said Chapter 133, of the Acts of eighteen hundred and eighty-six, and pro-

ceeded to construct and operate its road (which was completed between the termini mentioned in its charter on or about August 1st, 1891), and purchased the property formerly belonging to the said Wicomico and Pocomoke Railroad Company by virtue of the powers thereby conferred; that the said Baltimore and Eastern Shore Railroad Company executed and delivered to the Atlantic Trust Company the mortgage deed of trust dated July 1, 1890, and the supplemental deed of trust dated the day of , 1892, to secure the payments of the principal and interest of the bonds to the par value of $1,600,000, in said mortgage deeds of trust mentioned; and that the said deeds were duly executed, delivered and recorded and that the copies thereof filed with the bill of complaint in this cause are true copies, and that the said bonds and mortgage deeds of trust were executed and issued in pursuance of the powers and rights conferred upon said Baltimore and Eastern Shore Railroad Company by said Chapter 133, of the Acts of eighteen hundred and seighty-six.

(50) Fifth. That in the month of August, 1894, a sale was made under a decree of foreclosure and sale of said mortgage deed of trust, dated July 1, 1890, and said supplemental deed of trust, dated the day of , 1892, which decree was passed by the Circuit Court of the United States in and for the District of Maryland, in a cause pending therein, wherein the Scranton Steel Company and the Atlantic Trust Company were complainants and the Baltimore and Eastern Shore Railroad Company was defendant; that at said sale Nicholas P. Bond became the purchaser, and the sale to him was afterwards duly ratified and confirmed by said court, and it is agreed that either party to this cause may file certified copies of any part of the proceedings had and taken in the case of the Scranton Steel Company against the Baltimore and Eastern Shore Railroad Company to the same effect as though the record in said cause was duly offered in evidence.

Sixth. That after the ratification and confirmation of said sale, the said Nicholas P. Bond, together with certain associates, under and by virtue of sections 187, 188 and 189 and 190 of Article 23 of the Code of Public General Laws of the State of Maryland, did form a corporation for the purpose of owning, possessing, maintaining and operating such railroad under the name of "The Baltimore, Chesapeake & Atlantic Railway Company," by filing in the office of the Secretary of State of Maryland a certificate in the form required by section 187, of Article 23 aforesaid; that the certified copy of said certificate filed with (51) said bill is a true copy of said certificate, and that sec-

tions 187, 188, and 189, of Article 23 of the Code of Public General Laws of Maryland and such other sections or statutes as are material and pertinent may be considered by the court.

Seventh. That the Baltimore, Chesapeake and Atlantic Railway Company was duly incorporated under the provisions of sections 187, 188 and 189 of Article 23 of the Code of Public General Laws of Maryland, by virtue of the proceedings aforesaid.

Eighth. That on or about the first day of September, 1894, said Baltimore, Chesapeake & Atlantic Railway Company duly executed and delivered to the Atlantic Trust Company a mortgage or deed of trust to secure twelve hundred and fifty bonds of one thousand dollars each, and that the copy of said mortgage filed with said bill is a true copy thereof.

Ninth. That the complainant is the owner and holder of twenty of the thousand dollar bonds above mentioned, secured by the said deed of trust made by the Baltimore, Chesapeake & Atlantic Railway Company to the Atlantic Trust Company, and has been such holder since 1896.

Tenth. The defendants, Samuel P. Wilson, *et al*, named in the bill of complaint constituted the Board of County Commissioners of Wicomico county, Md., and was and is a body, (52) duly incorporated under the laws of that State. That the said board had power to assess such property as was liable to taxation, and that had been omitted from assessment by the general assessors of said county. That the general assessors of the said county did in pursuance of Chapter 120, 1896, of the Acts of Assembly of Maryland, make a general assessment of the property of the said county for State and county taxation, but omitted the property of the said Baltimore, Chesapeake and Atlantic Railway Co. from their schedule of assessments, and the said property was omited from the assessment books of the said county, and no levy made upon the same for State and county purposes until 1899. In 1899, the Board of County Commissioners of said county, as then constituted, gave notice to the said railroad company, in accordance with the statute, of the intention of the said commissioners to value and assess the property of the said company for State and county purposes. That in pursuance of the said notice, the said company, through both its attorney and its general superintendent, appeared on the day appointed, before the said County Commissioners, and the value of the property, with a schedule of the same, was then and there

agreed upon, between the said commissioners and the said attorney and the said general superintendent, but the said attorney and superintendent did not admit its liability to taxation, but claimed that the same was exempt therefrom; but the said County Commissioners assessed the said property at the valuation agreed upon and placed the same in the list of taxable (53) property, and upon the assessment books of the said county, and levied the taxes thereon for the years 1896, 1897, 1898 and 1899, but the said railroad company declined to pay the said taxes for the said years or any of them. Whereupon, the said commissioners brought suit for the same in the Circuit Court of Wicomico county and recovered judgment for the taxes for the year 1899, dated the 25th day of September, 1900, upon all the property of the said Company hereinafter specified, Salisbury, Wicomico county, being the home or general office of the said company. The said company, feeling aggrieved, took an appeal from the said judgment to the Court of Appeals of Maryland, which was tried at the January term, 1901, and the said judgment was affirmed by the Court of Appeals aforesaid, and stands affirmed and is found reported in the 93rd volume, page 113, et seq., of the said Court of Appeals reports. The defendants, named aforesaid, became legal successors to said County Commissioners, who had assessed and levied the taxes for 1899 as aforesaid; and they found the property of the said railroad company already upon the assessment books in the office of the said County Commissioners, and in casting up the assessable basis for taxation and levy to pay the county and State taxes, they included all the property of the said railroad company and levied thereupon the taxes for the years 1900 and 1901 for county purposes; the rate of levy for State purposes having been declared by an Act of Assembly, passed at the session of 1900. (54) The list of taxables for the said years, including the property of the said railroad company, both for State and county, were on the first day of August of each of the aforesaid years, (which said taxes remain unpaid), were placed in the hands of the collector of taxes for the said years, and they design and intend to enforce the payment of same against the property of said railroad company in said county. That the records in the case of the Mayor and City Council of Ocean City vs. Baltimore, Chesapeake & Atlantic Railway Co., both in the Court of Appeals of Maryland & in the Supreme Court of the United States, and also the record in the case of the County Commissioners of Wicomico county versus the said railroad company in the Court of Appeals of Maryland may be used at the hearing of this cause.

Eleventh. That the Atlantic Trust Company is a citizen of the State of New York, and has no power and authority vested in it to proceed in this behalf unless requested so to do by the holders of a majority of said bonds, and that the said Atlantic Trust Company has, in fact, declined and refused to proceed unless so requested. That the complainant is not a holder of a majority of the said bonds and that he has no knowledge or information as to who are, in fact, the holders of a majority thereof, nor any means of ascertaining who are such holders; that neither the complainant, nor the said Atlantic Trust Company, nor any of the holders of the bonds secured by said mortgage are (55) parties to the record in the case of the Mayor and City Council of Ocean City against the Baltimore, Chesapeake and Atlantic Railway Company, nor were they parties to the record in the case of the County Commissioners of Wicomico county against the Baltimore, Chesapeake & Atlantic Railway Company.

Twelfth. That the amount in dispute in this case is largely in excess of five thousand dollars; that the annexed schedules show the various properties of the Baltimore and Eastern Shore Railroad Company assessed for taxation in Wicomico county.

Thirteenth. That the general office of the Baltimore, Chesapeake & Atlantic Railway Company is located at Salisbury, in Wicomico county.

Fourteenth. That all parties to the record reserve all right of appeal from the decision of all questions raised in this case.

Schedules of Property Belonging to the Baltimore, Chesapeake & Atlantic Railway Company in Wicomico County.

(a) The following property constructed by the Baltimore and Eastern Shore Railroad Company under its charter under the power therein to build and construct a railroad between Eastern Bay and Salisbury, and purchased by Nicholas P Bond on foreclosure sale, and by him conveyed to the Baltimore, Chesapeake & Atlantic Railway Company.

(56) BARREN CREEK DISTRICT NO. 1.

8 21-100 miles of track at $3,850	$31,570 00
18-100 miles of side track at $2,500	450 00
Station at Mardella Springs	400 00
1-3 of an acre of land	75 00
2 55-100 miles of main track at $3,850	9,047 00
28-100 miles of side track at $2,500	700 00
Station at Hebron	250 00

SALISBURY DISTRICT NO. 9.

4 3-10 miles of main track at $3,850	$16,555 00
94-100 miles of side track at $2,500	2,350 00
Station at Byrd's	150 00
Station at Fulton	400 00
Lot on Mill street	200 00
Lot on Mill street	200 00

(b) Property at one time forming the Wicomico and Pocomoke Railroad Company and purchased by the Baltimore and Eastern Shore Railroad Company and included in its mortgage and purchased by Nicholas P. Bond at the foreclosure of said mortgage, and by him conveyed to the Baltimore, Chesapeake & Atlantic Railway Company; that the said Wicomico & Pocomoke Railroad Company had no exemption from taxa-
(57) tion either in its charter or by Act of Assembly.

PITTSBURG DISTRICT NO. 4.

8 3-100 miles of main tract at $3,850	$31,955 00
53-100 miles of side track at $2,500	1,325 00
Station at Parsonsburg	300 00
Tool and freight house at Pittsville	100 00
Station at Willard's	100 00

PARSONS DISTRICT NO. 5.

6 81-100 miles of main track at $3,850	$36,180 00
Station Building	1,000 00
1 31-100 miles of side track at $2,500	3,250 00
Car House	2,000 00
Water Tank	200 00
Station at Phillips	100 00

(c) Rolling stock of Railroad Company not located or used exclusively within Wicomico county, but used generally over its line of road, a part of this formerly the property of the Baltimore
(58) and Eastern Shore Railroad Company, and a part of the property purchased at the foreclosure of its mortgage and a part has been since purchased and added by the Baltimore, Chesapeake & Atlantic Railway Company $25,000 00

(d) Sundry wharves and floating property purchased by

the Baltimore, Chesapeake & Atlantic Railway Company subsequent to its organization, from sundry persons & corporations, none of whom were exempt in any way from taxation, and none of which was included in the property sold under foreclosure of the Baltimore and Eastern Shore Railroad Company, nor was it owned by the Baltimore and Eastern Shore Railroad Company prior to forclosure of its mortgage.

WHARF PROPERTIES SITUATED IN WICOMICO COUNTY.

Athaloo Wharf	$ 200 00
Quantico Wharf	400 00
White Haven	200 00
Sandy Hill Wharf	800 00
Tyaskin Wharf	200 00
Fruitland	450 00
Collins Wharf	100 00
Salisbury Wharf property	4,000 00
Roaring Point Wharf	1,200 00
Bivalve Wharf	700 00

(59) FLOATING PROPERTY.

Steamboats owned by the Baltimore, Chesapeake & Atlantic Railway Company and plying between Baltimore and various ports on the Chesapeake Bay:

Steamer Cambridge	$52,000 00
Steamer Avalon	52,000 00
Steamer Ida	48,000 00
Steamer Joppa	48,000 00
Steamer Enoch Pratt	28,000 00
Steamer Tred Avon	28,000 00
Steamer Pocomoke	44,000 00
Steamer Eastern Shore	40,000 00
Steamer Tivoli	52,000 00
Steamer Nanticoka	32,000 00
Steamer Choptank	16,000 00
Steamer Tangier	28,000 00
Steamer Maggie	16,000 00
Steamer Helen	12,000 00

NICHOLAS P. BOND,
Sol. for Complainant.
JAS. E. ELLEGOOD,
Sol. for Respdt.

COMPLAINANT'S EXHIBIT No. I.

(60) Filed with Agreed Statement of Facts.

Decree.

Filed July 18th, 1894.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MARYLAND.

The Scranton Steel Company, and the Atlantic Trust Company, Trustee, Complainants,
against
The Baltimore & Eastern Shore Railroad Company, Defendant.

This case came on to be heard at this term upon the bill of complaint of the Scranton Steel Company, the intervening petitions of the Atlantic Trust Company, the answers of the defendant Railroad Company to said bill of complaint and petitions, and the general replications of the complainants, and the report of Robert Lyon Rogers, special master, and upon the several orders, papers, proceedings and testimony had and taken in this cause, and thereupon the court being fully advised in the premises, upon motion of the solicitors for the complainants, it is this 18th day of July, 1894, ordered, adjudged and decreed as follows:

(61) 1. That the Baltimore & Eastern Shore Railroad Company, the defendant in this cause, was duly created and organized under the provisions and the act of the General Assembly of the State of Maryland, passed at the January session, 1876, chapter 242, and the right, privileges and franchises thereby acquired were further enlarged and increased by an act of the General Assembly of the State of Maryland, passed in the year 1886, chapter 133.

II. That by its original charter and the said act of the General Assembly amendatory thereof and supplementary thereto, it was authorized to locate, construct and operate a line of railroad from the shores of the Eastern Bay, in Talbot county, in the State of Maryland, to the town of Salisbury, in Wicomico county, through the counties of Talbot, Caroline, Dorchester and Wicomico; and it was further thereby empowered to purchase and operate any railroad or railroads in or out of the State of Maryland.

III. That in pursuance of the power aforesaid, the said Baltimore & Eastern Shore Railroad Company did purchase all the railroad and other property of the Wicomico & Pocomoke Railroad Company, which said railroad was duly conveyed to the said defendant railroad company by deed dated on the thirtieth day of June, 1890, and duly recorded in the Land Records of the counties of Worcester and Wicomico, in the State of Maryland.

(62) IV. That the said defendant was by its said charter and the said act amendatory thereof authorized and empowered to issue mortgage bonds, with or without coupons attached, in such amounts as its board of directors might deem advisable, and by its proper officers to mortgage its railroad and its extensions and branches with all their personal and real estate, franchises, rights and privileges, for the security and payment of the said mortgage bonds.

V. That by virtue of and in pursuance of its said powers the said defendant railroad company did, on the first day of July, in the year eighteen hundred and ninety, make, execute and deliver to the complainant, the Atlantic Trust Company, of New York, as trustee, its certain mortgage or deed of trust of that date, conveying to the said Atlantic Trust Company all and singular the entire line of railroad of the said defendant railroad company, situate, lying and being in the State of Maryland, between Broad Cove, Eastern Bay, Talbot county, and Salisbury, in Wicomico county, and extending from said termini through the counties of Talbot, Caroline, Dorchester and Wicomico, in the State of Maryland, and also all the line of railroad between Salisbury, Wicomico county, and Hammock Point, in Worcester county, which said last mentioned railroad comprised the railroad of the Wicomico & Pocomoke (63) Railroad Company, an entire distance of about ninety miles; and also all the steamboats, docks, piers and terminal property of the said defendant railroad company, and all the branches extending from the lines of the said railroads, together with the appurtenances, equipments, rights, franchises and privileges unto the same belonging or in anywise appertaining; all locomotives, cars and rolling stock whatsoever, and the incomes, tolls, rents, issues and profits thereof, including the roadway, rights of way, track, rails, ties, roadbed, side-tracks, turn-outs, switches, bridges, trestling, viaducts, culverts, stations, depots, warehouses, water tanks, machine shops, tools and improvement of all kinds whatsoever, offices, depot grounds, engine houses, and all other belongings and structures, and all things

and property of any kind, nature or description, real, personal or mixed, belonging to or used, or designed for use in connection with the said railroad or branches, including as well all property and things whatsoever of any such nature or description as above mentioned, belonging or appertaining to or for use in connection with the said railroad and branches aforesaid, which should be thereafter acquired and possessed by the said railroad company for or in connection with the said railroads and branches heretofore mentioned, for the working, use or operation thereof, as such property and things then possessed (64) or owned by the said railroad company, and together with all the corporate rights and franchises of the said railroad company then owned or possessed, or which it might thereafter *acquire,* connected with or relating to or exercisable in the said railroad of the said Baltimore & Eastern Shore Railroad Company, and of the said Wicomico and Pocomoke Railroad Company.

VI. That the said deed of trust was duly recorded in the counties of Talbot, Caroline, Dorchester and Wicomico and Worcester, in the State of Maryland, and was made and executed for the purpose of securing the payment of the first mortgage bonds of said defendant railroad company, to-wit: One thousand, six hundred bonds, bearing date on the first day of July, 1890, by each of which bonds the said defendant railroad company, for value received, acknowledged itself indebted to and promised to pay the bearer thereof the sum of one thousand dollars in gold coin of the then existing standard of weight and fineness of the United States of America at the agency of the said defendant railroad company, in the city of New York, on the first day of July, in the year 1920, with interest thereon in the meantime at the rate of five per centum per annum, payable semi-annually, in like gold coin, on the first days of January and July in each and every year on the presentation and surrender of the proper interest coupon attached to said bonds.

(65) VII. That the aforesaid mortgage, dated on the first day of July, 1890, expressly provided, among other things, that the said defendant railroad company, from time to time, and at all times upon reasonable request, should and would make, execute and deliver at its own expense, all such further acts, deeds, conveyances and assurances to the said Atlantic Trust Company, as trustee, for the better assuring of said trustee, as the said trustee or its counsel, learned in law, should reasonably advise or require, in pursuance of which said pro-

vision the said defendant railroad company, upon demand duly made by the said trustee, did, on the twelfth day of July, in the year eighteen hundred and ninety-two, execute and deliver to the said Atlantic Trust Company, as trustee, a supplementary deed of trust, whereby it conveyed on the same trusts set forth and expressed in the original indenture of mortgage or deed of trust, all and singular, the freedom, immunity and exemption from taxation theretofore given and granted to and conferred and bestowed upon the said defendant railroad company by the General Assembly of the State of Maryland, or intended so to be, together with any and every right, franchise, privilege, freedom, immunity and exemption then, or which might thereafter be held, owned, possessed or enjoyed by the said defendant railroad company, or to which it was then or might thereafter be entitled.

(66) VIII. That the aforesaid mortgage or deed of trust and the said supplementary deed of trust were duly made, executed, acknowledged, delivered and recorded in all respects in conformity with the law and were expressed to be for the purpose of securing the payment of the aforesaid one thousand, six hundred bonds and the coupons appertaining thereto, or so many thereof as might thereafter be issued under and in accordance with the terms and provisions of said mortgage or deed of trust without preference or priority and equally and ratably, and of the said one thousand, six hundred bonds, the said Atlantic Trust Company did, in accordance with the terms and provisions of the said deed of trust or mortgage, issue and deliver to the said defendant railroad company, one thousand, four hundred and sixty-nine, which said one thousand, four hundred and sixty-nine bonds were thereafter used, sold and disposed of by said railroad company, and are now outstanding.

IX. That the said Baltimore & Eastern Shore Railroad Company made default in payment on the first day of January, 1891, of the interest due on that day on all of said mortgage bonds which had been issued and are now outstanding as aforesaid, and secured by said mortgage or deed of trust to the Atlantic Trust Company as aforesaid, and has also made default in the payment of interest falling due at various times since
(67) that date, according to the tenor of said bonds, and the caupons attached thereto, all of which defaults still continue; and that demand was made of the said defendant railroad company for the payment of said coupons upon said mortgage bonds, and payment of the same was refused, and that neither on the first day of January, 1891, nor at any time since, did

the said Baltimore and Eastern Shore Railroad Company have at its agency in the city of New York, or else where, funds with which to pay said coupons, or any of them.

X. That more than six months after the said first mentioned default in the payment of interest on the said bonds had occurred, to-wit: more than six months after January 1st, 1891, the said interest having remained in arrears for more than six months after it had matured, and was duly demanded, the holders of a majority in amount of the said bonds then outstanding, elected to declare the whole principal sum thereof to be due and payable, and instructed the said trustee accordingly.

XI. That the amount of the principal and interest on the said mortgage bonds secured by said mortgage or deed of trust, which was in default and is now due and payable, is as follows: (68)

Interest due January 1st, 1891	$ 36,725 00
Interest thereon to the date of this decree	7,822 43
Interest due July 1st, 1891	36,725 00
Interest thereon to the date of this decree	6,720 68
Interest due January 1st, 1892	36,725 00
Interest thereon to the date of this decree	5,618 93
Interest due July 1st, 1892	36,725 00
Interest thereon to the date of this decree	4,517 18
Interest due January 1st, 1893	36,725 00
Interest thereon to the date of this decree	3,415 43
Interest due July 1st, 1893	36,725 00
Interest thereon to the date of this decree	2,313 68
Interest due January 1st, 1894	36,725 00
Interest thereon to the date of this decree	1,211 93
Interest due July 1st, 1894	36,725 00
And principal	1,469,000 00
	$1,794,420 26
Interest thereon from July 1st, 1894, to the date of this decree	4,407 00
	$1,798,827 26

(69) It is further considered, adjudged and decreed:

1. That the lien of the said bonds and coupons issued under and secured by the said mortgage or deed of trust of the Baltimore & Eastern Shore Railroad Company, dated July

1st, 1890, and the said supplementary deed of trust dated July 12th, 1892, is a valid lien on the railroads and other property hereinbefore mentioned and described, and upon the rights, franchises, privileges, freedoms, immunities and exemptions of said railroad company as therein set forth.

2. That the defendant, the Baltimore & Eastern Shore Railroad Company shall, within ten days after the entry of this decree, pay, or cause to be paid, to the complainant, the Atlantic Trust Company, of New York, or to the clerk of this court, for the use and benefit of the holders of the outstanding bonds aforesaid, the sum of $1,798,827.26 dollars in gold coin of the United States, with interest thereon from the entry of this decree to the date of payment, being the sum adjudged to be due and payable by the defendant, and secured by the said mortgage.

3. That unless the said payment, as hereinbefore directed, shall be made within the time directed as aforesaid, the said mortgage or deed of trust, dated July 1st, 1890, and the supplementary deed of trust aforesaid, dated July 12th, 1892, be foreclosed, and all property,rights, franchises, privileges, free-
(70) doms, immunities and exemptions or interests conveyed thereby and upon which they are a lien, be sold as hereinafter directed, and that under and by said sale, all equity of redemption of the defendant railroad company and of any and all persons claiming by, through or under the said defendant, or represented by any of the parties hereto of any and all the said mortgaged premises, property, rights, franchises, privileges, freedoms, immunities and exemptions, and every part or parcel thereof embraced or included, or intended to be included in the said mortgages or deeds of trust, be foreclosed and cut off and forever barred.

4. That the aforesaid property, rights, franchises, privileges, freedoms, immunities and exemptions shall, in default of the payment of the sums hereinbefore found to be due and decreed to be paid, be sold as an entirety and in one parcel without valuation, appraisement, redemption or extension, at public auction, to the highest bidder or bidders at the Courthouse door at Salisbury, in the county of Wicomico, in the State of Maryland, at a day and date and hour to be fixed by the special master herein appointed, in his advertisement of sale, such day and hour to be fixed in accordance with the request of the solicitor of the Atlantic Trust Company, complainant, and previous notice of the time and place, and terms of said

(71) sale shall be given by publication of a brief general advertisement, referring to this decree for further particulars and for a more specific description of the property herein ordeed to be sold, which advertisement shall be published at least once in each week for the term of thirty days preceding the day of sale, in two newspapers, one published in the city of Baltimore, Maryland, and one in Wicomico county, Maryland. The special master may, at the request of the complainant, adjourn or postpone said sale, and may, without further notice, proceed with thesaid sale on any date to which the same may have been thus adjourned. The said complainant, the Atlantic Trust company, and any bondholder or bondholders, may bid and purchase at such sale. In making such sale the said special master shall accept no bid for the property for a sum less than four hundred thousand dollars, nor from any bidder who shall not place in his hands for deposit with him at the time of making the bid as a pledge that such bidder will make good his bid if accepted by the court, the sum of one hundred thousand dollars in money or certified check. Of the price for which said property shall be sold there shall be paid at the time of the sale the deposit hereinbefore required, which shall be received as a part of the purchase price, and prior to the ratification of the sale there shall also be paid to the said special master such (72) additional sums in cash as may be required to pay all liens or claims which are prima facie prior in equity to said mortgage, and which are reported by the master to be entitled to a lien prior thereto, and also from time to time thereafter such further portions of said purchase price shall be paid in cash as the court may direct, in order to meet the expense of this suit, and pay such further claims, if any, against the mortgage property as the court may adjudge to be prior in equity to said mortgage.

Nothing herein contained, however, is to be taken or construed as an adjudication that any of the claims mentioned in said master's report are, in fact, entitled to priority of payment over the mortgage herein foreclosed, but all questions regarding the priority of such claims are left for future determination by the court. All sums of money received by said special master are to be placed in such bank or banks as the court may direct. The court reserves the right to reject any bid and to resell the said premises and property upon failure of any purchaser for thirty days to comply with any order of court requiring payment. The balance of the purchase price not required to be paid in cash, may either be paid in cash or the purchaser may satisfy and make good such balance of his bid in whole or in part by paying over and surrendering outstand-

ing mortgage bonds and overdue coupons, said bonds, or cou-
(73) pons, being received at such price or value as shall be equivalent to the amount that the holders thereof would be entitled to receive thereon in case the entire purchase price were paid in cash. All bonds or coupons that may be used to make such payment shall be surrendered to the special master and cancelled if the whole amount due therein is applied upon the purchase price, or if less than the said whole amount is applied then the amount so applied shall be stamped or written upon said bonds or coupons, which shall then be returned to the holder. The purchaser shall not be required to pay immediately in cash the amount of any receiver's certificates heretofore issued under the orders of this court, but shall receive the deed and take the property purchased, subject to the condition that such amounts shall be paid in from time to time as said obligations shall mature, which amounts shall thereupon be credited upnon the amount of the bid, the court reserving the right to resell the premises, or any part thereof, in case of any failure or omission of the purchaser to pay such amount into court on account of the bid as aforesaid, and as soon as any sale shall have been made by the said special master in pursuance of this decree, he shall report the same to this court for confirmation, further certifying to the court compliance by the purchaser or purchasers with the conditions of sale as hereinbefore prescribed.

(74) If any bid shall be accepted by the court and the person making the same shall fail to comply with any of the conditions of the sale or with any order of the court in respect thereto, the sum deposited by the bidder shall be forfeited and shall be applied as the court may direct. The purchaser or purchasers at the sale shall in no event be required to pay more than the amount of their accepted bid, but to the extent thereof shall be bound to pay and satisfy any and all outstanding and unpaid receiver's certificates or receiver's notes or obligations and all claims heretofore filed in this cause, but only when said court shall allow said claims and adjudge the same to be prior in lien to the mortgage foreclosed in this suit, and in accordance with the order or orders of the court allowing such claims and adjudging with respect thereto. And the purchaser or purchasers or their approved assigns shall be entitled to appeal from any or all orders and decrees of the court in respect to such claims or any of them and shall have all the rights with respect to such appeal which the complainant, the Atlantic Trust Company, would have, in case such appeals had been taken by it. The court reserves the right to retake and resell said property in case of the failure or neglect of the purchaser

or purchasers or their assigns, approved by the court as aforesaid, to comply with any order of the court in respect to prior lien claims above mentioned, or of receiver's certificates, within (75) thirty days after the service of the copy of such order upon such purchaser or purchasers or his or their assigns.

5. The fund arising from the sale of said mortgaged property shall be applied as follows, to-wit:

(1) To the payment of the costs of this suit, including the proper expenses of the sale herein ordered, and such compensation as may be awarded by the court to the said special master for making said sale, and the compensation of the complainant, the Atlantic Trust Company, of New York, for its services, charges and expenses in the execution of its trust, to be allowed by the court, and such allowances to the solicitors for the several parties hereto as counsel fees and such further allowances as the court may make.

(2) To the payment of all outstanding and unpaid receiver's certificates issued under the order of the court, dated on the eighth day of May, 1891, and under the order of the court dated on the 23rd day of February, 1894, as well as other just debts and obligations of the receiver, incurred since the appointment of said receiver, in the actual operation of the railroad.

(3) To the payment of all such claims as are decreed by the court to be prior in lien or equity to the lien of the aforesaid mortgage.

(76) (4) To the payment, ratably, of the principal and interest due and unpaid upon the said mortgage bonds secured by the said mortgage hereby foreclosed.

(5) Should there be any surplus remaining after making the payments above directed, the same shall be paid into the registry of this court to abide such order or decree as the court may make in respect thereto.

It is further ordered, adjudged and decreed that Robert D. Morrison be, and he is hereby, appointed special master to execute this decree, and upon confirmation of the sale hereby directed, to make, execute and deliver to the purchaser or purchasers thereof deed, or deeds of the property sold, and at the time of the execution of such deed or deeds the receiver appointed in this suit shall make, execute and deliver to the said purchaser or purchasers good and sufficient deed or deeds of conveyance or evidence of transfer of any and all property held by the receiver, or to which said receiver has in any manner acquired title, and upon the confirmation of such sale and

full compliance with the terms of such sale by the purchaser or purchasers, he, or they, or his, or their, assigns shall be entitled to a deed or deeds of assurance, to be executed according to law, by the Baltimore & Eastern Shore Railroad Company.

6. That the purchaser or purchasers of the property or their assigns shall be invested with and shall hold, possess and (77) enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, franchises, privileges, freedoms, immunities, exemptions and powers belonging to the said defendant company, as fully and completely as the said Baltimore & Eastern Shore Railroad Company held and enjoyed the same, and further that the said purchaser or purchasers shall be entitled to have and to hold said railroads and property free and discharged of and from the liens of the mortgages or deeds of trust foreclosed in this suit, and from the claims of the parties to this suit, or any of them.

All questions not hereby disposed of and determined, including the discharge of the receiver and the passing of his accounts and exceptions to the master's report, are hereby reserved for further adjudication, a statement of the same being held not to be necessary for the purpose of this decree, and the court reserves the right to make such further order at the foot of this decree as may seem just and proper.

THOS. J. MORRIS Judge.

July 18th, 1894.

(78) We consent to the entry of the foregoing decree; it being understood that an engrossed copy may be presented to the court for signature with this copy.

A. W. EVARTS,
Solicitor for Atlantic Trust Co.
SKIPWITH WILMER,
Solicitor for Scranton Steel Co.

MASTER'S REPORT OF SALE.

(79) Filed August 30, 1894.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE DISTRICT OF MARYLAND.

The Scranton Steel Company and the Atlantic Trust Company,
vs.
The Baltimore and Eastern Shore Railroad Company.

To the Honorable, the Judge of said Court:

The report of sale of Robert D. Morrison, special master appointed by the decree in the above entitled cause, to make sale of the property in the proceedings in said cause mentioned, respectfully shows, that having given notice of the time, place, manner and terms of sale, by advertisements inserted in the Baltimore Sun, a newspaper published in Baltimore city, and in the Wicomico News, a newspaper published in the town of Salisbury, in Wicomico county, in the State of Maryland, for once a week for a period of thirty days preceding the day of sale, and from time to time in other newspapers published in Baltimore city, said special master did, pursuant to said notice, on Wednesday, the 29th day of August, 1894, at one o'clock P. M., attend at the Court-house door in Salisbury, in said Wicomico county, and then and there sold the property, (80) franchises, privileges and immunities of the said The Baltimore and Eastern Shore Railroad Company mentioned and referred to in the proceedings to Nicholas P. Bond, at and for the price of four hundred thousand dollars, of which sum one hundred thousand dollars was paid to the said special master by certified check at the time of sale.

ROBT. D. MORRISON,
Special Master.

STATE OF MARYLAND,
City of Baltimore. } Set:

I hereby certify that on this 30th day of August, 1894, before me, James W. Chew, the clek of the United States Circuit Court for the District of Maryland, personally appeared Robert D. Morrison, special master, and made oath that the

facts stated in the foregoing report of sale are true, as therein set forth, and that the sale thereby reported was fairly made.

JAS. W. CHEW,
Clerk Circuit Ct. U. S.

August 30th, 1894.

We hereby consent to the immediate ratification of the sale above reported.

SKIPWITH WILMER,
(81) For Scranton Steel Co.
RICHD. M. VENABLE,
For the Baltimore & Eastern Shore Railroad Co.
A. W. EVARTS,
By CHARLES C. BEAMAN,
Of Evarts, Choat & Beaman,
For the Atlantic Trust Company.

ORDER OF CONFIRMATION OF SALE.

(82) Filed August 31, 1894.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Scranton Steel Company and the Atlantic Trust Company, Trustee,
vs.
The Baltimore & Eastern Shore Railroad Company.

The report of sale made by Robert D. Morrison, special master, filed on the thirtieth day of August, 1894, having been by the court read and considered, and it appearing to the court here that all of the parties to this cause, the plaintiff and defendant, have signed a consent to the immediate ratification of the same, it is now, by the court, this thirty-first day of August, 1894, ordered, adjudged and decreed that the sale reported by said special master to Nicholas P. Bond be, and the same is hereby, finally ratified and confirmed.

THOS. J. MORRIS, Judge.

UNITED STATES OF AMERICA,
District of Maryland, } To-wit:

(83) I, James W. Chew, clerk of the Circuit Court of the United States for the District of Maryland, do hereby certify that the foregoing are true copies, respectively, of the original decree, master's report of sale and order of confirmation of sale, which were filed on the respective dates set forth in the captions thereof, in the therein entitled case of the Scranton Steel Company and the Atlantic Trust Company *vs.* The Baltimore and Eastern Shore Railroad Company, in said court, as the same remain upon the files thereof.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court, this 14th day of January, 1903.

[Seal of Circuit Court, Maryland.] JAS. W. CHEW,
Clerk of said Circuit Court.

COMPLAINANT'S EXHIBIT No. 2.

(84) Filed with Agreed Statement of Facts.

INDENTURE.

This indenture, made this first day of July, in the year of our Lord, eighteen hundred and ninety, by and between the Baltimore and Eastern Shore Railroad Company, a corporation duly created and organized under and by virtue of the laws of the State of Maryland, party of the first part, and the "Atlantic Trust Company," of New York, a corporation duly created and organized under and by virtue of the laws of the State of New York, trustee, for the uses and purposes and upon the terms and conditions hereinafter mentioned, party of the second part.

Whereas, the party of the first part is a railroad corporation, existing under and in pursuance of the laws of the State of Maryland, and owns and operates a line of railroad in the State of Maryland, between Broad Cove, Eastern Bay, Talbot county, and Salisbury, Wicomico county, and also is the owner of the railroad, real and personal estate and property of the Wicomico and Pocomoke Railroad Company between Hammock Point, in Worcester county, and Salisbury, in Wicomico county, in said State, and also is the owner of certain steamboats and terminal property situate in Talbot county and (85) Anne Arundel county, in the State of Maryland, and also is the owner of certain shares of the capital stock of the Bay

Ridge and Annapolis Railroad Company, a railroad situate in Anne Arundel county, in said State, between Bay Ridge and Annapolis; and,

Whereas, the stockholders of the party of the first part, at a general meeting duly called and held, as provided by law, in the city of Baltimore, on the first day of July, in the year 1890, at which meeting a majority of the capital stock of the party of the first part was represented by the holders thereof, in person or by proxy, did, by vote of the holders of the entire capital stock of said company at said meeting, adopt certain resolutions in the words and figures following, to-wit:

"Whereas, in order to complete the construction and equipment of the standard gauge railroad of the said Baltimore and Eastern Shore Railroad Company, from Broad Cove, Eastern Bay, Talbot county, to Salisbury, Wicomico county, Maryland, and to provide for the necessary improvements in and about the same, and to furnish the necessary rails and equipment for the railroad of the party of the first part, situate in Worcester and Wicomico counties, in the State of Maryland, between Hammock Point, in said Worcester county, and Salisbury, in said Wicomico county, formerly the railroad of the (86) Wicomico and Pocomoke Railroad Company, and to provide for the working, use and operation of said railroad, it is necessary for this company to issue its negotiable bonds, as hereinafter set forth.

"Resolved, That this company make and issue its negotiable bonds, payable to bearer or the registered owner thereof, for the aggregate amount of one million, six hundred thousand dollars, which bonds shall be of the denomination of one thousand dollars each, payable in gold coin of the United Sattes of America of the present standard of weight and fineness, and shall be numbered consecutively from one to sixteen hundred, inclusive, shall bear date July first, A. D., eighteen hundred and ninety, and shall bear interest from date at the rate of five per cent. per annum, payable semi-annually, on the first days of January and July in each year, as evidenced by coupons thereto attached, and said bonds shall become due and payable one the first day of July in the year nineteen hundred and twenty.

"Resolved, That, for the purpose of securing the payment of the said bonds and the interest which shall accrue thereon, this company shall make, execute and deliver to the Atlantic Trust Company, of New York, trustee, a mortgage of all and singular the railroad of said company, constructed, and to be constructed, now owned, or hereafter acquired, lying between Broad Cove, Eastern Bay, Talbot county, and Salisbury,

(87) Wicomico county, in the State of Maryland, and passing through Caroline and Dorchester counties, in said State; and also the railroad formerly belonging to the Wicomico and Pocomoke Railroad Company, situate in said State of Maryland, between Hammock Point, in Worcester county, and Salisbury, in Wicomico county, and all branches from said lines extending, and the steamboats, wharves and terminal property situate in Talbot and Anne Arundel counties, and the shares of the capital stock of the Bay Ridge and Annapolis Railroad Company amounting to forty-nine thousaid, five hundred dollars, and all the real and personal property now owned, or to be hereafter acquired, for or in connection with the working, use and operation of said railroads, or the branches, between the places aforesaid; and said mortgage shall be in trust for the benefit and security of the holders of such bonds, to the extent aforesaid, without preference, priority or distinction as to lien or otherwise.

"Resolved, That the Board of Directors be, and they are hereby, authorized, empowered and directed for and on behalf of this company, to cause its corporate seal to be affixed to each of said bonds, and to cause the president and secretary to sign the same as such president and secretary, and when so executed, to deliver the same to said trustee. In the execution of the coupons attached to said bonds, the signature of the treas-
(88) urer of this company engraved thereon, shall be regarded and treated in all respects, in fact and in law, as equivalent to the manual signing thereof.

"Resolved, That the president and Board of Directors of the Baltimore and Eastern Shore Railroad Company be, and they are hereby, authorized to sell and dispose of the said bonds from time to time, for such prices and on such terms as they shall deem for the interest of this company.

"Resolved, That an amount of said bonds, being five hundred and fifty thousand dollars, and numbered from one to five hundred and fifty, inclusive, shall be reserved and set aside by said trustee for the purpose of exchanging the same for an issue of the first mortgage bonds of this company, amounting to five hundred thousand dollars, secured under a mortgage of date the thirtieth of October, 1888, unto the Mercantile Trust and Deposit Company of Baltimore, trustee.

"Resolved, That an amount of said bonds, being one hundred and twenty-five thousand dollars, being bonds numbered from five hundred and fifty-one to six hundred and seventy-six, inclusive, shall be retained by said trustee for the purpose of retiring and existing issue of bonds of the Annapolis and Bay Ridge Railroad Company, amounting to fifty thousand dol-

lars and paying unto the Chesapeake Terminal Company the (89) cost of the wharves and piers and steamboats owned by them and agreed to be transferred and assigned unto the party of the first part.

"Resolved, That the bonds so to be issued, and the coupons to be thereto attached, shall be substantially in the form following, to-wit:

No. ..... $1,000.

UNITED STATES OF AMERICA,
STATE OF MARYLAND.

THE BALTIMORE AND EASTERN SHORE RAILROAD COMPANY,
CONSOLIDATED FIRST MORTGAGE BOND.

Total issue, $1,600,000.

EXEMPT FROM ALL STATE, COUNTY OR MUNICIPAL TAXATION.

For value received, the Baltimore and Eastern Shore Railroad Company promises to pay to bearer, if not registered, or to the registered owner hereof, if registered, the sum of one thousand dollars, at the agency of said company in the city of New York, in lawful gold coin of the United States of America, (90) of the present standard of weight and *finess,* on the first day of July, in the year nineteen hundred and twenty, with interest thereon in the mean time at the rate of five per centum per annum, payable semi-annually, in like gold coin, at the same place, on the surrender of the annexed coupons, or, if registered, to the registered holder hereof.

The principal and interest of this bond are exempt from all State, county or municipal taxation, for the period of thirty years, counting from the completion of said railroad. This bond, upon surrender for cancellation of the unmatured coupons, may be registered on the books of said railroad company in its office in Baltimore, or at its agency in New York; if so registered, it will thereafter be transferred only on the books of said company by the owner in person or by attorney, duly authorized, according to the rules established for that purpose, and thereafter the interest shall be payable only to the registered holder thereof, or his lawful attorney.

This bond is one of a series of this date aggregating one million, six hundred thousand dollars, numbered from one onward, consecutively, secured by and subject to all the provisions of a mortgage of date July first, eighteen hundred and ninety, conveying and assigning to the "Atlantic Trust Com-

pany," of New York, trustee, all the railroad now owned by
(91) the said Baltimore and Eastern Shore Railroad Company, or by it hereafter constructed or acquired between its termini, Broad Cove, Eastern Bay, Talbot county, and Salisbury, Wicomico county, in the State of Maryland, and all the railroad of the Wicomico and Pocomoke Railroad Company between Salisbury, Wicomico county, and Ocean City, Worcester county, in said State of Maryland, and the steamboats, docks and wharves, piers and terminal property of said Baltimore and Eastern Shore Railroad Company, in Talbot county, and Anne Arundel county, in the State of Maryland, and the shares of the capital stock of the Bay Ridge and Annapolis Railroad Company amounting to forty-nine thousand, five hundred dollars, together with all the other franchises of said companies, and all said railroads and the branches and property of said railroads extending from their main lines, and all the equipment, tools and incomes thereof, and all corporate rights and property of said companies herein mentioned relating to or for the uses of the same which they may now own or hereafter acquire, which mortgage is duly recorded among the land records in the several counties in which said railroads are located, to which mortgage reference is made for the provisions thereof.

This bond shall not become obligatory until the certificate endorsed hereon is duly signed on behalf of the trustee named in the aforesaid mortgage.

(92) In testimony whereof, the said Baltimore and Eastern Shore Railroad Company has caused its corporate seal to be hereunto affixed, and the same to be attested by the signatures of its president and secretary, this first day of July, 1890.

Attest:

President.

Secretary.

FORM OF COUPON.

On the first day of , 18 , the Baltimore and Eastern Shore Railroad Company will pay to the bearer hereof, on surrender of this coupon, twenty-five dollars, at its agency in the city of New York, being six months' interest on its consolidated first mortgage bond No.

Treasurer.

FORM OF CERTIFICATE OF TRUSTEE.

The "Atlantic Trust Company" of New York, trustee,

hereby certifies that this bond is one of the series described in the mortgage referred to within.

President.

And whereas, at a meeting of the stockholders of the party of the first part the form of this mortgage having been then and (93) there submitted by the president and entered upon the minutes, it was by the holders of the entire amount of the capital stock of said company represented at said meeting, unanimously

"Resolved, that the form of mortgage submitted by the president is hereby approved, and that the board of directors of this company be, and they are, hereby authorized, empowered and directed to cause such mortgage to be made and executed by this company under its corporate name, subscribed by its president and its corporate seal thereto affixed, attested by its secretary and when so executed that it be duly acknowledged so as to entitle it to be recorded in accordance with the laws of the State of Maryland, and when so acknowledged that it be delivered to said trustee and duly recorded, and to do and cause to be done all acts necessary, proper or expedient to carry into effect the objects and purposes expressed in said resolutions, and to perfect the said issue of bonde and mortgage to secure the same."

And whereas, at a metting of the board of directors of the party of the first part, duly called and held in the city of Baltimore, Maryland, on the first day of July, 1890, at which a quorum of said board was present and voted, all the above recited resolutions of said stockholders, including the form of this (94) present mortgage, were submitted and spread upon the minutes, it was by the vote of the majority of said board of directors, and with the unanimous concurrence of all who were present at said meeting,

"Resolved, that the resolutions of the stockholders, and the form of bond and mortgage therein proposed and submitted to us, be, and the same are, hereby approved, concurred in and adopted, and the same are ordered to be spread upon the minutes of this meeting.

"Resolved, that this company make and execute its bonds, by said resolutions authorized, in the manner and form therein provided, and make, execute and deliver to the Atlantic Trust Company of New York, trustee, a mortgage as in said resolutions authorized, in the terms, manner and form therein set forth; that the president and secretary be, and they are, hereby authorized, empowered and directed for and on behalf of this company to affix its corporate seal to each of said bonds, and to sign the same as such president and secretary and when so executed to deliver

the same to said trustee. That the president be, and he is, hereby authorized and directed to subscribe the corporate name of this company to said mortgage and to cause its corporate seal to be affixed thereto and attested by the secretary, and the president and secretary are hereby authorized and empowered to do all acts, matters and things which may be necessary or proper in the (95) premises to perfect the said issue of bonds, and to render effective the lien and security of the said mortgage."

Now this indenture witnesseth, that the said party of the first part, for the purpose of securing the payment of the principal and interest of the said bonds, when and as the same shall become due and payable according to the tenor and effect of the said bonds so made and executed, and in consideration of the sum of one dollar lawful money of the United States to it in hand paid by the said party of the second part at the time of the execution and delivery of these presents, the receipt whereof is hereby acknowledged, has given, granted, bargained and sold, assigned, transferred, set over, released, conveyed and confirmed, and by these presents does give, grant, bargain and sell, assign, set over, release, convey and confirm, unto the said party of the second part, and to its successors and assigns, and to its successor or successors in the trust hereby created, all and singular the entire line of railroad of the party of the first part, situate, lying and being in the State of Maryland, between Broad Cove, Eastern Bay, Talbot county, and Salisbury, in Worcester county, and extending from said termini through the counties of Talbot, Caroline, Dorchester and Wicomico, in said State, and also all the line of railroad between Salisbury, Wicomico county, and Hammock Point, in Worcester county, in said State (which said (96) last-mentioned railroad comprised the railroad of the Wicomico and Pocomoke Railroad Company), an entire distance of about ninety miles, and also all the steamboats, docks, piers and terminal property of said Baltimore and Eastern Shore Railroad Company, situate in Talbot and Anne Arundel counties, in the State of Maryland, and the shares of the capital stock of the Annapolis and Bay Ridge Railroad Company, amounting to forty-nine thousand, five hundred dollars, and all the branches extending from the lines of said railroad, together with the appurtenances, equipments, rights, privileges and franchises unto the same belonging or in anywise appertaining, all locomotives, cars, and rolling stock whatsoever, and the incomes, tolls, rents, issues and profits thereof, including the roadway, rights of way, tracks, rails, ties, roadbed, side-tracks, turnouts, switches, bridges, trestling, viaducts, culverts, stations, depots, warehouses, water-tanks, machine-shops, tools and implements of all kinds whatsoever, offices, depot-grounds, engine-houses, and

all other buildings and structures, sand and gravel-pits and deposits of material, and all branches, and all things and property of any kind, nature or description whatsoever, real, personal or mixed, belonging to or used, or designed for use, or in connection with said railroads and branches, including as well all property and things whatsoever of any such nature or description as above mentioned, belonging or appertaining to or for use in connection with said railroad and branches aforesaid, which shall be here- (97) after acquired and possessed by the party of the first part, for or in connection with the said railroads and branches hereinbefore mentioned, or the working, use or operation thereof, as such property and things now possessed or owned by the said party of the first part, for or in connection with the said railroads or the working, use or operation thereof, together with all the corporate rights and franchises of the said party of the first part, now owned or possessed, or that may be hereafter acquired, connected with or relating to, or exercisable in the said railroad of the said Baltimore and Eastern Shore Railroad Company, and of the said Wicomico and Pocomoke Railroad Company, or the working, use or operation thereof.

To have and to hold the same to the party of the second part, its successors and assigns, forever, and to its successor or successors in this trust, but upon trust, nevertheless, it being hereby expressly covenanted and agreed by and between the parties hereto, the said party of the first part covenanting as well for itself as for its successor or successors and assigns, and the party of the second part covenanting as well for itself as for its successor or successors in said trust, that the above described premises, property, rights, franchises, and appurtenances, and the real estate herein mentioned are to be had and holden by the said party of the second part only upon and for the trusts and (98) purposes following, to-wit:

Article First. For the equal benefit and security of all and every the persons or bodies corporate who shall be or at any time become the holders of the said bonds, or such of them as shall be issued by the party of the first part, without preference, priority or distinction as to lien or otherwise of any of the said bonds over the others by reason of priority in the time of issuing the same, and so that each and all of the said bonds issued and to be issued as aforesaid shall have the same right, lien and privilege under and by virtue of this mortgage, and shall all be equally secured hereby with like effect as if they had all been made, executed and delivered simultaneously with the delivery hereof.

Article Second. Until default shall be made by the party of

the first part in the payment of the principal or interest of the said bonds, or any of them, according to the tenor and effect of the said bonds and of this mortgage, and on the days, times and place mentioned therein respectively without further delay, or until default be made by the party of the first part in respect to some act or thing, covenant or agreement in any of the said bonds or herein required to be done, kept or performed, the party of the first part shall be permitted to possess, manage, operate, use and enjoy all and singular said railroads and property, with the appurtenances thereto, hereinbefore described.

(99) Article Third. If the party of the first part, its successor, successors or assigns, shall at any time hereafter, after demand made, make default, or refuse, neglect or omit, for any period exceeding six months, to pay the semi-annual interest on the bonds hereby intended to be secured, or any of them, or shall after demand made, make default, or refuse neglect or omit for any period after the maturity thereof to pay the principal sum of each and all of the said bonds, or shall suffer or allow any lawful taxes or charges to fall in arrear, or any lien to be obtained on the said railroad and property, whereby the security of this mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants and stipulations contained herein, or in the bonds secured or intended to be secured hereby, and on its part to be kept and performed, then, and in either of such events, the party of the second part shall upon the written request of the holders of a majority in amount of the said bonds secured hereby and then outstanding, and upon adequate security and indemnity against all costs, expenses and liabilities to be by the party of the second part incurred, and not otherwise, forthwith demand and with such force as may be necessary, enter upon, take and maintain possession of all and singular the railroads, depots, and all the estate, premises, rights, contracts and franchises hereby conveyed and mortgaged, or agreed or intended so (100) to be, and as the attorney in fact or agent of the said party of the first part, by its agents and substitutes duly constituted, or by its managers, superintendents, receivers or servants, have, hold, use, manage, operate and enjoy the same, and each and every part thereof to as full an extent as the party of the first part might lawfully do, making from time to time all needful and proper repairs, alterations and additions, and receiving all tolls, income and revenue thereof, and after deducting the expenses of such use, operation, reasonable repairs, alterations and additions, all lawful taxes and assessments on said railroads and property, and the costs or charges of such taking possession, and proper compensation for its services for such taking posses-

sion and management while in possession, and such sum or sums as may be sufficient to indemnify it against any liability, loss or damage, for or on account of any matter or thing done by it in good faith and in pursuance of its duties as said trustee, the party of the second part shall apply the remaining net income and revenue therefrom without giving preference, priority or distinction to one bond over another, to the payment:

First, Of the interest due on the bonds then outstanding hereby secured or intended so to be in full, in the order in which such interest shall become due thereon;

Second, In case the principal of said bonds shall have become due, according to the tenor and effect of said bonds, or (101) of these presents, then to the payment of the principal of said bonds in full, if the said income and proceeds be sufficient, but if not then *pro rata.*

Or the said party of the second part shall and will, after or without entering upon or taking such possession, upon the written request of holders of a like amount of said bonds then outstanding, and upon like security and indemnity, and not otherwise, proceed to sell and dispose of all and singular the said railroads, estate, real and personal, corporate rights, franchises and premises hereby mortgaged, or agreed or intended so to be, to the highest and best bidder at public auction in the city of Baltimore, or at such place as the said trustee may designate, and at such time as it shall appoint, having first given notice of the time and place of such sale by advertisement published not less than twice in each week for three months in one or more newspapers published in the cities of Baltimore and New York, or to adjourn said sale from time to time in its discretion, and after so adjourning to make such sale at the time and place to which the same may be so adjourned, and to make and deliver to the purchaser or purchasers of the said railroads and their appurtenances, and all other the said property and franchises thereto belonging, good and sufficient deed or deeds in the law in fee simple, free from all and every of the trusts hereby created, and without obligation to inquire into the necessity, expediency or authority of or for any such sale, which sale so made as aforesaid shall be a (102) perpetual bar both in law and in equity against the party of the first part, and all persons claiming or to claim the said described premises and property, or any part thereof, or any interest therein, by, from, under or through the party of the first part, and after deducting from the proceeds of such sale proper allowances for all the expenses thereof, including attorney and counsel fees, and all other expenses, additions or lia-

bilities which may have been paid or incurred by it for taxes or assessments on the said railroads, or the appurtenances, or other property thereto belonging, or any part thereof, as well as reasonable compensation for its own services, it shall be lawful for the trustee, and it shall be its duty, to apply the residue of the money arising from the said sale, without giving preference, priority or distinction to one bond over another, to the payment of the whole amount of the unpaid principal of said bonds then outstanding and of the whole amount of the interest which shall at that time have accrued and be unpaid, *pro rata*, without preference or priority, and ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest. And in the event of there being in the hands of the trustee any portion of the trust estate, or the proceeds thereof, after the paymen n full of the principal and interest of such bonds, then the trustee shall reconvey, transfer and pay over such surplus to the party of the first part, its successor, successors or assigns, for its or their sole use and benefit.

(103) Or the said trustee shall and will upon the written request of the holders of a like amount of said bonds then outstanding, and upon like security and indemnity, and not otherwise, proceed to protect and enforce the rights of the bondholders under these presents by a suit or suits in equity or at law, whether for the specific performance of the stipulated covenants, trusts, conditions, and agreements, or any of them, contained herein, on the part of the party of the first part to be kept and performed, whether in aid of the execution of the powers herein granted or otherwise, as the trustee being advised by counsel learned in the law shall deem most effectual to protect and enforce such rights; it being understood, and it is hereby expressly declared, that the rights of entry and sale hereinbefore granted are intended as cumulative remedies, additional to all other remedies allowed by law, and that the same shall not be deemed in any manner whatever to deprive the trustee or the beneficiaries under this trust of any legal or equitable remedy by judicial proceedings consistent with the provisions of these presents according to the true intent and meaning thereof.

Article Fourth. And it is hereby expressly declared and agreed that no holder or holders of a bond or of any bonds or coupons secured hereby shall have the right to institute any suit, action or proceeding in equity or in law for the foreclosure of this mortgage, or the execution of the trust thereof, or for the (104) appointment of a receiver, without first giving thirty days' notice in writing to the trustee of the fact that default has occurred and continued as aforesaid, nor unless the holders of a

majority of the said bonds then outstanding have made request in writing to the trustee as above provided, and have afforded it a reasonable opportunity to proceed to execute the powers hereinbefore granted, or to institute such action, suit or proceeding in its own name, and have also offered to it adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby, and such notification, request and offer of indemnity are hereby declared to be conditions precedent to any action or cause of action for the foreclosure of the said mortgage or for the application for the appointment of a receiver, it being understood and intended that no one or more holders of bonds or coupons shall have the right in any manner whatever to affect, disturb or prejudice the lien of this mortgage by his or their action, except in the manner herein provided, but that all proceedings in law or equity shall be instituted, had and maintained for the equal benefit of all holders of said bonds and coupons outstanding.

Article Fifth. And it is hereby further covenanted and agreed that neither the trustee, its successor or successors or holder or holders of the bonds or coupons secured or intended to be secured hereby, or any of them, shall sell the premises hereby (105) mortgaged, or intended so to be, or any part thereof, or institute any suit, action or proceeding in law or equity for the foreclosure hereof, otherwise than in the manner herein provided.

Article Sixth. And it is further expressly covenanted and agreed that if the party of the first part, its successor, successors or assigns, shall at any time hereafter, after demand made, make default, or refuse, neglect or omit, for any period exceeding six months, to pay the semi-annual interest on the bonds intended to be hereby secured, or any of them, then the holders of a majority in amount of the said bonds then outstanding may elect to declare the whole principal sum thereof to be due and payable, and may, by an instrument or concurrent instruments in writing under their hands, instruct the said trustee to declare said principal sum to be due and payable, whereupon the whole principal sum of each and all of said bonds then outstanding shall, forthwith, be due and payable, notwithstanding that the time limited therein for the payment thereof may not then have elapsed; but such declaration, making said principal sum become due, may be annulled or reversed, before the entry of any decree of sale under this mortgage in any judicial proceeding and before the advertisements of any sale hereunder by the trustee, by the holders of a like majority of the said bonds secured or intended

to be secured hereby, by an instrument or concurrent instru-
(106) ments in writing, under their hands, instructing the trustee to annul or reverse such declaration, and the said trustee shall thereupon declare the same to be annulled and reversed, and thereafter the said bonds shall continue to run in the same manner as they would have done had not such original election been made. Provided, always, and it is hereby declared, that no such action of the trustee or bondholders shall extend, or be taken to effect, any subsequent default, or impair the rights resulting therefrom; and in thee event of any sale of the railroad, estates, real and personal, hereby mortgaged, or agreed or intended so to be, either by the trustee or by judicial proceedings, as hereinbefore mentioned, or in the event of the entry of any decree of sale under this mortgage in such judicial proceedings, then, and in either case, the whole principal sum of each and all of the said bonds then outstanding and intended to be hereby secured shall forthwith be due and payable, notwithstanding that the time limited therein for the payment thereof may not have elapsed; and in no other case and for no other purpose, except as in this article provided, shall the principal sum of any of said bonds become due and payable before the date fixed in such bonds for the payment thereof. This provision is expressly declared not to be in the nature of a penalty for a breach of condition or for the non-payment of interest, but to be a provision which, having regard to the nature of the mortgaged premises, and the
(107) impossibility of a sale thereof in parcels, without serious prejudice to all interests, is essentially necessary to effectuate the objects and purposes of the parties hereto.

Article Seventh. And it is further expressly covenanted and agreed that at the sale of the aforesaid railroads, property, franchises or appurtenances, or of either or any part thereof hereinbefore conveyed, made by virtue of the power hereinbefore granted, or by judicial authority, for the purpose of enforcing the lien of these presents, the party of the second part, its successor or successors, may, with the assent in writing of the holders of at least one-half of the bonds hereby secured and then outstanding, or their agents or trustees, personally or by agent or atteorney, bid for, and if the same be attainable at the price hereinafter mentioned, purchase and acquire the property so offered for sale on behalf of all holders of the bonds secured by this instrument which may then be outstanding, in proportion to the respective interests of such holders in the said bonds and the coupons thereto belonging; provided, however, that nothin herein contained shall authorize the said trustee to bid on behalf of the holders of said bonds a sum exceeding the whole amount of the

said bonds then outstanding, with the interest accrued thereon, and the expenses of such sale for the entire property then held upon the trust of this instrument, or an amount reasonably proportionate thereto for any part of the said property.
(108) And it is further agreed that the bonds and over-due coupons aforesaid shall be received in payment of the purchase money of any property sold at such sale as equivalent to so much of the said purchase money as would be distributable and payable thereon.

Article Eighth. The party of the first part hereby covenants and agrees with the said trustee, party of the second part, its successor of successors, that is, the party of the first part, or its successor, successors, or assigns, from time to time, and at all times, upon reasonable request, shall and will make, execute and deliver, at its own expense, all such further acts, deeds, conveyances and assurances in law for the better assuring unto the said trustee and its successor or successors in the trust hereby created, upon the trusts and for the purposes herein expressed or intended, all and singular the railroads, property, real, personal and mixed, rights, privileges and franchises, hereby mortgaged or conveyed in trust, or intended so to be, now owned or possessed, or which hereafter may be acquired by or vested in the said party of the first part, its successor or successors or assigns, as by the said party of the second part, or its counsel learned in the law, shall be reasonably advised or required.

Article Ninth. And it is further expressly covenanted and agreed that the party of the second part, its successor or succes-
(109)sors, shall at any and all times during the continuance of the trust hereby created, have full power and authority, to be exercised in its discretion, to release to any party or parties who may be designated in writing by the party of the first part, its successor or successors or assigns, free from the operation and lien of these presents, any part of the hereby mortgaged property which in the judgment of the party of the first part shall be unnecessary for use in connection with the operation and maintenance of the said railroads and their business, or which may become disused by reason of the change in the location of any station house, depot, shop or other building connected with the said railroads; provided, always, that the proceeds of any sale, exchange, lease or other disposition of the property so released from the operation of this mortgage shall be invested by the party of the first part either in the improvement of any remaining part of the mortgaged premises, or the purchase by it of other property, real or personal, which property so purchased,

as well as any that may be acquired in exchange as aforesaid by the party of the first part, shall be subject to the lien and operation of these presents, and until the proceeds of any property shall be so applied, such proceeds shall be deposited with the trustee, as further security hereunder.

(110) And the said party of the first part, its successor or successors or assigns, shall have full power from time to time to dispose of any portion of the rails on its said railroads, or equipment, machinery, tools and implements which shall be at any time held or acquired for the use of the party of the first part, its successor or successors or assigns, and which shall, in its judgment, have become unfit for such use; provided, however, that so far as necessary the material and equipment so disposed of shall be replaced by other and better material and equipment, which shall be subject to the lien and operation of these presents.

Article Tenth. The party of the first part hereby agrees to waive, and does hereby irrevocably waive, the benefit and advantage of any and all stay, exemption, extension, valuation and appraisement laws now existing, and which may hereafter be passed by the United States or any of the States thereof, and all other laws now existing, or which may hereafter be passed by the United States or any of the States thereof, which may or might prevent, postpone, hinder or delay the exercise of the right of the party of the second part to enter upon, operate or sell the mortgaged premises or any part thereof, or to commence or to continue any action or proceeding in regard thereto, or the exercise of any powers, rights, privileges and remedies of the party of the second part or any of the bondholders under and in accord-

(111) ance with the provisions hereof. The party of the first part hereby expressly covenants and agrees not to claim, set up or take the benefit or advantage of any such law or laws.

Article Eleventh. And it is hereby further covenanted and agreed, and the trusts created by this instrument are accepted, upon the express condition that the trustee shall not incur any liability or responsibility whatever in consequence of permitting or suffering the party of the first part to retain or be in possession of the railroads, estates and premises hereby mortgaged or agreed or intended so to be, or any part thereof, and to use and enjoy the same; nor shall the trustee be or become responsible or liable for any destruction, deterioration, loss, injury or damage which may be done or occur to the railroads and estates hereby mortgaged or agreed or intended so to be, either by the party of the first part or its agents or servants, or by any other person or

persons whomsoever, nor shall the trustee be in any way responsible for the consequences of any breach on the part of the party of the first part of any of the covenants herein contained, nor of any act of the party of the first part, its agents or servants; nor shall the trustee be held liable for any act, default or misconduct of any agents or persons employed by it unless chargable with gross negligence in the selection or continuance of their employment; nor shall such trustee be answerable except for (112) its own willful default or gross misconduct; and in case the trustee shall go into possession of said mortgaged premises, and operate the same as hereinbefore provided, it shall be indemnified out of the funds and property which shall come into its hands as aforesaid for all claims and demands against it arising from negligence, carelessness or misconduct of its officers, agents and employes, and in all cases the trustee shall be authorized to pay such reasonable compensation as it may deem proper to all attorneys, servants and agents whom it may reasonably employ in the management of the trust; and the trustee shall be entitled to and shall have just compensation for all services which it may render hereafter in connection with the trust, to be paid by the party of the first part out of the estate; the trustee may resign from the trust by notice in writing to the party of the first part and to all known bondholders at least sixty days before such resignation shall take effect, or such shorter time as may be accepted as sufficient notice, and upon the execution and delivery, if such shall be required, of the deed of conveyance and transfer to a successor in trust.

In case at any time hereafter the said trustee or any trustee hereafter appointed shall resign or be removed by a court of competent jurisdiction or otherwise, or shall become incapable or unfit to act in the said trust, the successor or successors to said trustee shall be appointed by the holders for the time being of a (113) majority in interest of the bonds secured hereby and outstanding, by an instrument or concurrent instruments signed by said bondholders or their attorneys, in fact, duly authorized; provided, nevertheless, and it is hereby agreed and declared that in case it shall at any time prove impracticable after reasonable exertion to appoint in the manner hereinbefore provided, a successor in the event of a vacancy in said trust, the new trustee may be appointed upon application to any court of competent jurisdiction in which any part of the mortgaged property may be situated, upon application of the holders of one-eighth in interest of the amount of said bonds then outstanding.

Any new trustee so appointed shall thereupon become vested with all the estate, properties, rights, powers and trusts granted to or conferred upon the party of the second part by these

presents, with like effect as if named as trustee herein, and the trustee so resigning or removed shall, on the written request from the new trustee who may be appointed, immediately execute a deed or deeds of conveyance to vest in such new trustee upon the trusts herein expressed, all the property, privileges and rights which may at any time be held upon said trust; and it is understood and agreed that the word "trustee," as used in this instrument, shall be held and construed to mean the trustee, party of the second part, or its successor or successors for the time being. (114) Proof of the execution of an instrument appointing a new trustee, or any request in writing or other instrument herein privided for to be executed by bondholders shall be sufficient for the purpose hereof, if made in the following manner: The amount of bonds held by persons signing any such instrument may be proven by the certificate of the trustee, or any depositary approved by the trustee or the party of the first part, that the bonds were deposited by such persons with the trustee or such depositary on the day of the date of such instrument.

The fact and date of the execution by any person of any such instrument may be proven by the certificate of the trustee, or by the certificate of any notary public or other officer, in the United States or elsewhere, authorized to take the acknowledgement of deeds to be recorded in the State of Ohio, that the person signing such request or other instrument acknowledged to him the execution thereof.

Article Twelfth. Any of the bonds secured hereby may at any time, on the payment of the fee established therefor, be registered under such regulations as the party of the first part may establish, in the name of the holder or the name of any nominee or nominees, on the books of said party of the first part at New York, or at such other place or places of registration as it may designate, and such registration may from time to time, (115) on complying with such regulations, be extinguished and cancelled and again renewed, but after such registration and while the same remains unextinguished and uncancelled such bonds, can only be transferred by the registered holder, his duly authorized agent or lawful successor in title, by a proper entry of transfer on the books of said party of the first part and endorsement of such transfer on the bond. Due extinguishment and cancellation of registration stamped or endorsed upon the bond by the said party of the first part will restore the negotiability thereof; but this article shall apply to the principal of the bonds only and not to the coupons.

Article Thirteenth. In the execution of the coupons se-

cured by these presents, the signature of the treasurer engraved thereon shall be regarded and treated as in all respects in and in law equivalent to the manual signing of the said coupons.

Article Fourteenth. An amount of the bonds of this issue, being five hundred and fifty thousand dollars and numbered from one to five hundred and fifty inclusive, shall be reserved and set aside by said trustee for the purpose of exchanging the same for an issue of the first mortgage bonds of this company amounting to five hundred thousand dollars, secured under a mortgage of (116) date October thirtieth, eighteen hundred and eighty-eight, unto the Mercantile Trust and Deposit Company of Baltimore City, trustee, and when said bonds of the first issue shall have been exchanged therefor the same shall be cancelled by the said trustee and the said mortgage released. In addition to said bonds so retained for said purpose, the said trustee shall retain of the bonds of this issue an amount equal to the sum of one hundred and twenty-five thousand dollars, being bonds numbered from five hundred and fifty-one to six hundred and seventy-six inclusive, for the purpose of retiring the existing issue of bonds of the Bay Ridge and Annapolis Railroad Company, amounting to fifty thousand dollars, and paying unto the Chesapeake Terminal Comptny the cost of the wharves and piers and steamboats owned by them and agreed to be transferred and assigned unto the party of the first part.

Article Fifteenth. If the party of the first part shall well and truly pay the sums of money, as provided by the said bonds secured hereby, and the coupons thereto attached, required to be paid by it, and shall well and truly keep and perform all the covenants, agreements and undertakings herein and hereby assumed and required to be kept and performed according to the true intent and meaning of these presents, then and in that case the estate, right, title and interest of the said party of the second part, trustee, or its successor or successors, shall cease, determine and become void.

(117) And the said party of the first part doth hereby constitute and appoint Wilfred Bateman as its attorney to acknowledge this indenture of mortgage as its act and deed.

And the said "Atlantic Trust Company" of New York, doth hereby appoint A. J. Benjamin its attorney for it and on its behalf to acknowledge this instrument as its act and deed.

In witness whereof, the party of the first part hath hereunto caused its corporate name to be subscribed by its president,

and its corporate seal affixed attested by its secretary, and in testimony of its acceptance of the trusts herein created and conferred, the said trustee, party of the second part, has caused its corporate name to be hereunto subscribed by its president and its corporate seal affixed, attested by its secretary, on the day and year first above written.

THE BALTIMORE AND EASTERN SHORE RAILROAD COMPANY,
By JOSEPH B. SETH,
[Seal] President.

Attest:
THEOPHILUS TUNIS, Secretary.

THE "ATLANTIC TRUST COMPANY" OF NEW YORK, TRUSTEE,
By W. H. MALE, President.

[Seal.]
(118) Attest:
J. S. SUYDAM,
Secretary.

Signed, sealed and delivered in the presence of
C. F. STEIGHTOFF.

STATE OF MARYLAND, }
Talbot County, } to-wit:

I hereby certify that on this third day of July, in the year 1890, before the subscriber, a justice of the peace of the State of Maryland in and for the county aforesaid, personally appeared Wilfred Bateman, the attorney duly appointed in the foregoing instrument, by the Baltimore and Eastern Shore Railroad Company, and acknowledged the said instrument to be the act and deed of the said corporation.

And at the same time also personally appeared before me A. J. Benjamin, the attorney duly appointed in the foregoing instrument by the "Atlantic Trust Company" of New York, and acknowledged the same to be the act and deed of said corporation.

J. H. T. HUBBARD, J. P.

STATE OF MARYLAND, }
Talbot County, } Set.:

(119) I hereby certify that J. H. T. Hubbard, Esquire, before whom the annexed acknowledgment and affidavit was made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland in and for Talbot county, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments. I further certify that I am acquainted with the handwriting of the said justice, and verily believe the signature to be his genuine signature.

In testimony whereof I hereunto set my hand and affix the seal of the Circuit Court of Talbot county, this third day of July, A. D. 1890.

[Seal.] THOMAS HUGHLETT,
Clerk of the Circuit Court for Talbot County.

STATE OF NEW YORK, }
City and County of New York, } to-wit:

I hereby certify that on this seventh day of July, in the year 1890, before the subscriber, a notary public of the State (120) of New York, in and for the city and county of New York, personally appeared William H. Male, the president of the "Atlantic Trust Company" of New York, trustee, in the foregoing indenture of mortgage, and for and on behalf of said corporation made oath in due form of law on the Holy Evangely of Almighty God, that the consideration stated in said instrument is true and bona fide as therein set forth, and that he is the president and agent of the said corporation, mortgagee under the foregoing instrument.

[Seal.] C. F. STEIGHTOFF,
Notary Public, Kings County, N. Y.

Certificate filed in New York county.

STATE OF MARYLAND, }
Talbot County, } to-wit:

The foregoing mortgage received for record this ninth day of July, 1890, and the same day recorded in Liber 113, folio No. ——, one of the Land Records of Talbot county, and examined by

THOMAS HUGHLETT,
Clerk of the Circuit Court for Talbot County, Maryland. Easton.

(121) STATE OF MARYLAND, }
Caroline County, }

The foregoing mortgage received for record this ninth day of July, 1890, and the same day recorded in Liber L. H. G., No. 55, folio ——. one of the land records of Caroline county, Maryland, and examined by

LUTHER H. GADD,
Clerk of the Circuit Court for Caroline County, Maryland. Denton.

STATE OF MARYLAND, }
Dorchester County, } to-wit:

The foregoing mortgage received for record this eleventh day of July, 1890, and the same day recorded in Liber C. L., No. 14, folio ———, one of the land records of Dorchester county, Maryland, and examined by

CHARLES LAKE,
Clerk of the Circuit Court for Dorchester County, Maryland. Cambridge.

(122) STATE OF MARYLAND, }
Wicomico County, } to-wit:

The foregoing mortgage received for record this sixteenth day of July, 1890, and at the same day recorded in Liber F. M. S., No. 6, folio ———, et cet., one of the land record books of Wicomico county, Maryland, and examined by

F. M. SLEMONS,
Clerk of the Circuit Court for Wicomico
[Seal.] County, Maryland. Salisbury.

STATE OF MARYLAND, }
Worcester County, } to-wit:

The foregoing mortgage received for record this fourteenth day of July, 1890, and the same day recorded in Liber J. M. R., No. 1, folio 567, *et cet.*, one of the land record books of Worcester county, Maryland, and examined by

FRANCIS HENRY PURNELL,
Clerk of the Circuit Court for Worcester County, Maryland. Snow Hill.

(123) STATE OF MARYLAND, }
Anne Arundel County, } to-wit:

The foregoing mortgage received for record this eighteenth day of July, 1890, and the same day recorded in Liber S. H., No. 37, folio 295, et cet., one of the land record books of Anne Arundel county, Maryland, and examined by

SPRIGG HARWOOD,
Clerk of the Circuit Court for Anne Arundel County, Maryland. Annapolis.

COMPLAINANT'S EXHIBIT No. 3.

(124) Filed with Agreed Statement of Facts.

This indenture, made this day of , in the year of our Lord eighteen hundred and ninety-two, by and between the Baltimore and Eastern Shore Railroad Company, a corporation duly created and organized under and by virtue of the laws of the State of Maryland, party of the first part, and the "Atlantic Trust Company," of New York, a corporation duly created and organized under and by virtue of the laws of the State of New York, trustee, for the uses and purposes, and upon the terms and conditions hereinaftter mentioned, party of the second part;;

Whereas, Heretofore, and on or about the first day of July, in the year of our Lord eighteen hundred and ninety, by a certain indenture of mortgage or deed of trust bearing date on that day, duly executed and recorded in the land record books of Talbot, Caroline, Dorchester, Worcester, Wicomico, and Anne Arundel counties, in the State of Maryland, on the ninth, eleventh, fourteenth, sixteenth, and eighteenth days of July, 1890, respectively, the party of the first part did give, grant, bargain and sell, assign, set over, release, convey and confirm unto the party of the second part, and to its successors and assigns, and to its successor or successors in the trust thereby created, all and singular the premises, property, rights, franchises and appurtenances in said mortgage or deed of trust par-
(125) ticularly mentioned, set forth and described, for the uses and purposes and upon the terms and conditions therein expressed; and

Whereas, In and by an Act of the General Assembly of the State of Maryland to extend the privileges and enlarge the powers of the party of the first part, passed April 6, 1886, it was

enacted that its franchises, property, shares of capital stock and bonds should be exempt from all State, county or municipal taxation for the term of thirty years, accounting from the date of the completion of its road, and it was the intention of the parties hereto that such immunity or exemption from taxation so given and granted to said party of the first part, as aforesaid, should be included in said mortgage or deed of trust and be covered, granted, conveyed and assigned thereby, together with any and every right, franchise, privilege, freedom, immunity and exemption then held, owned, possessed or enjoyed by said party of the first part, or to which it was or might be entitled; and

Whereas, In and by the said mortgage or deed of trust it was among other things expressly covenanted and agreed that the party of the first part, or its successor, successors or assigns, from time to time, and at all times upon reasonable request, should and would make, execute and deliver at its own expense, all such (126) further acts, deeds, conveyances and assurances in law for the better assuring unto the party of the second part, as trustee, and its successor or successors in the trust thereby created, upon the trusts, and for the purposes therein expressed or intended, all and singular the railroads, property, real, personal and mixed, rights, privileges and franchises thereby mortgaged or conveyed in trust, or intended so to be, then owned or possessed or which thereafter might be acquired by or vested in the party of the first part, its successor or successors, or assigns, as by the said party of the second part, or its counsel learned in the law should be reasonably advised or required; and

Whereas, The party of the second part has requested and required the party of the first part to make, execute and deliver this indenture as a further conveyance and assurance as aforesaid, and the party of the first part is willing and desirous and duly authorized so to do:

Now this indenture witnesseth, that the said party of the first part, in consideration of the premises and of the sum of one dollar, lawful money of the United States, to it in hand paid by the said party of the second part at the time of the execution and delivery of these presents, the receipt whereof is hereby acknowledged, hath given, granted bargained and sold, assigned, transferred, set over, released, conveyed and confirmed, and by (127) these presents doth give, grant, bargain and sell, assign, transfer, set over, release, convey and confirm all and singular the freedom, immunity and exemption from taxation heretofore given and granted to and conferred and bestowed upon the party of the first part by the aforesaid Act of the General Assembly

of the State of Maryland or intended so to be, together with any and every right, franchise, privilege, freedom, immunity and exemption now or which may hereafter be held, owned possessed or enjoyed by said party of the first part, or to which it is or may hereafter be entitled.

To have and to hold the same to the party of the second part, its successors and assigns forever and to its successor or successors in the trust, but upon trust, neverthless, it being hereby expressly covenanted and agreed by and between the parties hereto, the said party of the first part covenanting as well for itself as for its successor or successors and assigns, and the party of the second part covenanting as well for itself as for its successor or successors in the trust, that the above described property, rights, franchises, privileges, freedoms, immunities and exemptions are to be had and holden by the said party of the second part only upon and for the trusts and purposes upon and for which the premises, property, rights, franchises and appurtenances included in and (128) covered and conveyed by the above mentioned mortgage or deed of trust dated the first day of July, 1890, were to be, and are had and holden by it, for the provisions, terms and conditions of which trusts and purposes reference is hereby made to said mortgage or deed of trust with the same certainty as if they were here fully and particularly set forth

And the said party of the first part doth hereby consti tute as its attorney, to acknowledge this indenture of mortgage as its act and deed.

And the Atlantic Trust Company doth hereby appoint , its attorney to acknowledge this instrument as its act and deed.

In witness whereof, the party of the first part hath hereunto caused its corporate name to be subscribed by its president and its corporate seal to be affixed and attested by its secretary, and in testimony of its acceptance of the trusts herein created and conferred, the party of the second part hath hereunto caused its corporate name to be subscribed by its president and its corporate seal to be affixed and attested by its secretary on the day and year first above written.

COMPLAINANT'S EXHIBIT No. 4.

(129) Filed with Agreed Statement of Facts.

Certificate of Incorporation of the Baltimore, Chesapeake and Atlantic Railway Company.

Know all men by these presents:

Whereas, at a sale of the railroad formerly owned by the Baltimore and Eastern Shore Railroad Company, made on the

twenty-ninth day of August, in the year one thousand, eight hundred and ninety-four, by virtue of a mortgage or deed of trust executed by said company and in pursuance of a decree of the Circuit Court of the United States in and for the District of Maryland, the undersigned, Nicholas P. Bond, did then and there become the purchaser of all the property, real and personal, belonging to the said Baltimore and Eastern Shore Railroad Company, all of which said property was situated wholly within the State of Maryland, and also of all powers, rights, privileges, immunities and franchises of said Baltimore and Eastern Shore Railroad Company, embraced in said decree; and

Whereas, the undersigned are the associate and assigns of the said Nicholas P. Bond;

Now, therefore, this certificate witnesseth:

I. That we, the undersigned, do hereby form a corporation for the purpose of owning, possessing, maintaining and operat-
(130) ing said railroad under the name and style of the Baltimore, Chesapeake and Atlantic Railway Company.

II. That John E. Searles, Brayton Ives, Wm. F. Havemeyer, Charles C. Pomeroy, Winthrop M. Tuttle, Enoch Pratt, Nicholas P. Bond, J. Upshur Dennis, Henry P. Scott, Thomas B. Smith, Willard Thompson, Carroll S. Tyson, J. S. Ricker, shall be its first directors and serve for the period of one year from the date of these presents.

III. That the amount of capital stock of said corporation shall be one million dollars, divided into twenty thousand shares of the par value of fifty dollars each.

In witness whereof, we have hereunto set our respective hands and seals this twenty-ninth day of August, in the year of our Lord, one thousand, eight hundred and ninety-four.

NICHOLAS P. BOND. [Seal.]
JNO. E. SEARLES. [Seal.]
HENRY P. SCOTT. [Seal.]
ROBT. P. GRAHAM. [Seal.]
JOHN B. MARSHALL. [Seal.]

Test:

WM. A. TRADER.
H. L. D. STANFORD.

STATE OF MARYLAND, Wicomico County, } to-wit:

I hereby certify that on this twenty-ninth day of August, A. D., 1894, before me, the subscriber, a justice of the peace of said State in and for said county, personally appeared Nicholas (131) P. Bond, John E. Searles, Henry P. Scott, Robert P. Graham and John B. Marshall and did each acknowledge the foregoing certificate as their respective act and deed.

WM. A. TRADER, J. P.

STATE OF MARYLAND, Wicomico County, } Set.

I hereby certify that William A. Trader, Esquire, before whom the annexed acknowledgement was made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for Wicomico county, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgments, and that his signature thereto subscribed is genuine.

In testimony whereof, I hereto set my hand and affix the seal of the Circuit Court of Wicomico county, this 29 day of August, A. D., 1894.

[Seal.] JAMES T. TRUIT,
Clerk of the Circuit Court for Wicomico county.

I, the undersigned, one of the judges of the First Judicial Circuit of Maryland, do hereby certify that the foregoing certificate is in conformity with law.

HENRY LOYD.

Filed in the office of the Secretary of State for record on the 30th day of August, 1894, and was on the same day recorded in Liber 2, folios 65 & 66.

Certified by

WM. T. BRANTLY,
Secretary of State.

(132) THE STATE OF MARYLAND,
Office of the Secretary of State.

I, Wilfred Bateman, Secretary of State, of the State of Maryland, do hereby certify that the foregoing is a true and cor-

rect copy of the certificate of incorporation of the Baltimore, Chesapeake and Atlantic Railway Company, as the same appears of record in the office of the Secretary of State.

In testimony whereof I have hereunto set my hand and by order of the Governor, attested by his signature, have affixed the great seal of the State of Maryland, this eighth day of January, one thousand, nine hundred and three.

[Seal.]

JOHN WALTER SMITH.

By the Governor:

WILFRED BATEMAN,
Secretary of State.

COMPLAINANT'S EXHIBIT No. 5.

(133) Filed with Agreed Statement of Facts.

This indenture, made this first day of September, A. D., 1894, between the Baltimore, Chesapeake and Atlantic Railway Company hereinafter called the mortagor, party of the first part and the "Atlantic Trust Company" of New York, hereinafter called the trustee, party of the second part, witnesseth;

Whereas, by a decree of the Circuit Court of the United States in and for the District of Maryland, all the property, rights, privileges, franchises and immunities of a certain corporation known as the Baltimore and Eastern Shore Railroad Company were ordered to be sold at public auction, on the 29th day of August, 1894, at the courthouse door at Salisbury, Wicomico county, in the State of Maryland, including the railroad of said corporation situate wholly within the State of Maryland, as by reference to the said decree, now of record in said court, will more fully and at large appear; and

Whereas, the said Baltimore, Chesapeake and Atlantic Railway Company, is a corporation duly organized by the purchasers at said sale as provided by the public general laws of the State of Maryland, the said sale having been made by virtue of a certain mortgage or deed of trust in said decree mentioned, and the said purchasers having become under said sale the owners of all the property, rights, privileges and immunities then and there sold, of the said Baltimore and Eastern Shore Railroad Company; and

Whereas, the said Baltimore, Chesapeake and Atlantic Rail-

way Company so organized by said purchasers, and having thereby become the owners of all the property, franchises, immunities and privileges purchased at said sale, is thereby and thereupon empowered, among other things, to buy and build wharves, to charter, purchase and hold steamboat, to ply in connection with its railroad to any port or ports, to any place or places whatsoever; and

Whereas, the said Baltimore, Chesapeake and Atlantic Railway Company has power to make and issue bonds, bearing such rate of interest not exceeding six per cent. per annum, payable at such times and places, and in such amount or amounts as it may deem expedient, and to sell and dispose of such bonds at such prices and in such manner as it may deem proper, and to secure the payment of such bonds by mortgage or deed of trust of its railway or any part thereof, and of its real and personal property and franchises, whether now held by it or hereafter acquired; and

Whereas, the said Baltimore, Chesapeake and Atlantic Railway Company by virtue of the aforesaid power by it possessed, has purchased all the property, real and personal of the Maryland Steamboat Company of Baltimore City, and also of the Choptank Steamboat Company of Baltimore City, also of the Eastern Shore Steamboat Company of Baltimore City; and

Whereas, for the purpose of making the purchases aforesaid and for other corporate purposes of the said Company it has been necessary to borrow the sum of one million, two hundred and fifty thousand dollars; and

Whereas, at a meeting of the Board of Directors of the said Baltimore, Chesapeake and Atlantic Railway Company, held at the office of the Company at Baltimore City, in the State of Maryland, on the thirty-first day of August, 1894, the following preamble and resolutions were unanimously adopted.

"Whereas, this company is authorized to borrow money on its credit for the proper transaction of its business, and to issue bonds therefor, and to secure the payment of such bonds by pledging all its property, real and personal, immunities, franchises and privileges; and

"Whereas, it is necessary to borrow the sum of one million, two hundred and fifty thousand dollars to enable it to properly transact its business and to pay for the properties purchased by it,

"Resolved, (1.) That for said purpose twelve hundred and fifty bonds of this company be issued, each of which shall be substantially in the following form:

UNITED STATES OF AMERICA.

STATE OF MARYLAND.

The Baltimore, Chesapeake and Atlantic Railway Co.,

No.———— $1,000.

FIRST MORTGAGE FIVE PER CENT. GOLD BONDS.

Know all men by these presents, That the Baltimore, Chesapeake and Atlantic Railway Company, for value received, hereby acknowledges itself to be indebted to the bearer hereof in the sum of one thousand dollars, lawful money of the United States of America, which sum the said company promises to pay the bearer or the registered owner hereof, if registered, in gold coin of the United States of America of standard weight and fineness, (134) on the first day of September, 1934, with interest thereon in the meantime, payable in like gold coin at the rate of five per cent. per annum, payable half yearly on the first days of March and September in each year, on the delivery by the bearer thereof of the proper coupons therefor, the said principal and interest to be paid at the office of the said Baltimore, Chesapeake and Atlantic Railway Company in the city of New York.

This bond is one of a series of twelve hundred and fifty bonds of like tenor, date and amount, and amounting in the aggregate to one million two hundred and fifty thousand dollars, the payment whereof is equally secured by a mortgage bearing even date herewith, duly authorized and executed and delivered by the said Baltimore, Chesapeake and Atlantic Railway Company to the "Atlantic Trust Company," of New York, in trust, to secure the payment of the principal and interest of the said bonds, to the provisions of which said mortgage this bond is subject. The said mortgage has been duly recorded and is a first lien upon the railroad, steamboats, wharves and other property of the said Baltimore, Chesapeake and Atlantic Railway Company, as therein set forth.

This bond is transferable by delivery except when endorsed as registered in the name of the owner upon the books of the company, and such registered owner may at any time make the same transferable by delivery by having it registered, payable to bearer, but the interest coupons shall remain transferable by delivery notwithstanding the registration of the bond to which the same are attached.

This bond is not to become obligatory upon the said Balti-

more, Chesapeake and Atlantic Railway Company until certificate endorsed hereon has been signed by the said trustee.

In witness whereof, the said Baltimore, Chesapeake and Atlantic Railway Company has caused these presents to be signed by its president and sealed with its corporate seal, duly attested at Baltimore city, in the State of Maryland, this first day of September, A. D. 1894.

_____,
President.

Attest:

_____,
Secretary.

Resolved, (2.) That the said bonds shall be secured without distinction or priority of one over the other by a mortgage to the Atlantic Trust Company, in the form now submitted to us, which we adopt and approve.

Resolved, (3.) That the President shall be authorized to affix the corporate seal to each of said twelve hundred and fifty bonds and to sign the same as president; that the secretary shall be authorized to attest them, and that the president and secretary shall be duly authorized for and on behalf of this company, and as its act and deed, to execute the said indenture of mortgage and to affix the seal of the company thereto, and thereafter to cause the same to be duly acknowledged, delivered and recorded.

Resolved, (4.) That the president shall be authorized to sell and dispose of said bonds either for cash or in payment of debts and obligations of this company, or to use the same as collateral security for such debts and obligations.

Resolved, (5.) That a certificate in the following form, executed by the said trustee, shall be endorsed on each of said bonds:

"This bond is one of a series of twelve hundred and fifty bonds, secured by a mortgage duly executed, acknowledged, delivered and recorded by the said Baltimore, Chesapeake and Atlantic Railway Company, dated on the first day of September, A. D. 1894, and conveying the property therein mentioned to the undersigned, as trustee.

_____,
By _____,
President.

(135) REGISTRATION.

DATE OF REGISTRY.	IN WHOSE NAME REGISTERED.	REGISTRAR.

Resolved, (6.) That to each of the bonds shall be attached, as a part thereof, coupons for the semi-annual installment of interest, to be paid thereon until maturity, substantially in the form following, and having the engraved signature of the treasurer, to-wit:

"The Baltimore, Chesapeake and Atlantic Railway Company will pay to the bearer hereof $25.00 in gold coin at the office of the treasurer of the company in the city of New York, on the first day of ———, being semi-annual instalment of interest on mortgage bond No. ——.

———,

Treasurer.

And whereas, at a meeting of the stockholders of the Baltimore, Chesapeake and Atlantic Railway Company, held at the office of the company at Baltimore city, in the State of Maryland, on the 31st day of August, 1894, there were present the owners of the entire capital stock of said company, both common and preferred, and at such meeting all of the above recited resolutions of the Board of Directors and the form of this present mortgage were submitted and spread upon the minutes of the meeting, and it was thereupon by the holders of the entire stock of said company, both common and preferred, unanimously—

Resolved, "That the preamble and resolutions of the Board of Directors and the form of mortgage and of bonds proposed and submitted to us be, and the same are hereby, approved, and the same are ordered to be spread upon the minutes of this meeting, and the president and other officers be, and they are hereby, given full power and authority to carry into effect the objects and purposes expressed in said resolutions, and to make, execute and deliver the said bonds and mortgage in the form proposed and for the purposes therein mentioned"; and,

Whereas, by the holders of the entire preferred stock of said company at said meeting personally present, it was unanimously—

Resolved, (1.) That we, the holders of every share of the preferred stock of the Baltimore, Chesapeake and Atlantic Railway Company, do hereby consent to the execution and delivery of the mortgage submitted to us, with the full understanding that the same is and shall be a first lien upon all property of the Baltimore, Chesapeake and Atlantic Railway Company now held by it or hereafter to be acquired; and,

Resolved, (2.) That we do agree that in each certificate of preferred stock now or hereafter issued there shall be stamped or inserted substantially the following words:

"This stock is subject only to the prior lien of a mortgage dated the first day of September, 1894, executed to secure twelve hundred and fifty, one thousand dollars, first mortgage five per cent. gold bonds, and the renewals and extensions thereof; and,

Resolved, (3.) That in testimony of our consent and agreement thereto, we do, as individual holders of said stock, sign this resolution as spread upon the minutes of the meeting.

Now, therefore, this indenture witnesseth, That in consideration of the premises and for the better securing the payment of the bonds so to be issued upon the security of these presents and the interest which will accrue thereon, and in consideration of the sum of one dollar, lawful money of the United States, unto the Baltimore, Chesapeake and Atlantic Railway Company, well and truly paid by the party of the second part, at the time of the execution thereof, the receipt whereof is hereby acknowledged, it, the said Baltimore, Chesapeake and Atlantic Railway Company, hath grantd, bargained, sold, aliened, enfeoffed, released, confirmed, assigned, transferred and set over, and by these presents , in pursuance and execution of the power and authority in it in anywise vested in this behalf enabling, doth grant, bargain, sell, alien, enfeoff, release, confirm, assign, transfer and set over unto the said Atlantic Trust Company and its successors and assigns all the railroad of the Baltimore, Chesapeake and Atlantic Railway Company, to-wit:

All its railroad and lines of railroad, tracks, sidings and turn-outs, of every sort and kind now owned by it, and also all its property, real, personal and mixed, of every kind, being the lines of railroad situate, lying and being in the State of Maryland and commencing at a place called Claiborne, on the Broad (136) Cove, Eastern Bay, Talbot county, and running thence through the counties of Talbot, Caroline, Dorchester, Wicomico and Worcester to Ocean City, Worcester county, Maryland, an entire distance of about ninety miles, and all the branches extending from said line, and all locomotives, cars, rolling stock,

roadway, rights of way, track, rails, ties, road-bed, side-tracks, turn-outs, switches, bridges, trestlings, viaducts, culverts, stations, depots, warehouses, water tanks, machine shops, tools and implements of all kinds whatsoever, offices, depot grounds, engine houses, and all other belongings and structures, and all things and property of every kind, nature or description, real, personal or mixed, belonging to or used or designed for use in connection with the said railroad and branches; and also all the steamboats, steamboat lines, docks, wharves, piers and terminal property belonging to said railway company; and also all the incomes, tolls, rents and profits arising from the property hereby mortgaged; and also all the railroads, rolling stock, steamboats, steamboat lines, docks, piers, wharves and terminal property which may hereafter be acquired or owned by the said company, or to which it may in anywise become entitled, it being the intention of these presents that all property, whether now owned and possessed by said company, or hereafter acquired by it, shall become subject to the lien hereof and be subjected hereto;

Together with all and singular the corporate rights, privileges, immunities, franchise and exemptions of the Baltimore, Chesapeake and Atlantic Railway Company, which it now owns either in its own right or as the successor and purchaser of the Baltimore and Eastern Shore Railroad Company, or which it may hereafter in any manner acquire;

Together with all the easements, rights, liberties, privileges, hereditaments and appurtenances whatsoever unto any of the hereby granted and mentioned premises and estates belonging or appertaining, and the reversions and remainders, rents, issues and profits thereof, and all the estate, right, title, interest, property, claim and demand of every nature and kind whatsoever of the Baltimore, Chesapeake and Atlantic Railway Company, as well as at law as in equity, of, in and to the same and every part and parcel thereof, in trust and confidence, however, for the use, benefit and security as hereinafter mentioned, of the several persons, bodies politic and corporate, their successors, executors, administrators or assigns, who shall be or become holders of said bonds to the amount of one million, two hundred and fifty thousand dollars intended to be hereby secured, or any of them.

And this indenture further witnesseth, That in consideration of the premises the parties hereto do hereby for themselves, and their successors and assigns, covenant and agree with and to each other as follows, each party covenanting for the matters and things to be done or permitted by it respectively:

Article I. The Baltimore, Chesapeake and Atlantic Railway Company, the mortgagor aforesaid, will punctually pay to the lawful holders of the bonds aforesaid intended to be hereby secured, or any that may be issued or accepted in lieu, substitution or renewal of the same, respectively, the interest thereon half yearly as the same shall become due and payable, according to the terms in said bonds contained, and on the days therein respectively mentioned for the payment of the same, and will also on the days and times mentioned in said bonds, respectively or whenever the principal sums of said bonds shall, according to the provisions thereof, or of this mortgage, become due and payable, fully and entirely pay off and satisfy as aforesaid, the whole of said bonds, principal and interest, without further delay and without deduction from either principal or interest, for any tax or taxes, if any there be, which by any present or future laws of the State of Maryland may be payable for or in respect of the said property hereby mortgaged for State or municipal purposes, the said mortgagor hereby agreeing to pay such tax or taxes which may now or hereafter be lawfully payable thereon.

Article II. The party of the first part agrees to keep at its office in the city of New York an appropriate book for the purpose of registration and transfer of the bonds secured hereby, and any holder thereof shall be entitled to have his name and address and the number of any of said bonds held by him entered therein, upon verifying his title to such bonds by the production thereof, and personal identification, when required, or upon written order duly verified of the person last registered as the owner. Such registration shall authenticate the title of the holder of every bond so registered to act in the matter of the administration of the trust hereby created, and after such registration no transfer except upon said register shall be valid, either as to the trustee or otherwise, unless the last registration shall have been to bearer. Each bond shall continue subject to successive registrations and to transfers to bearer at the option of the owner, but the interest coupons shall at all times be transferable by delivery, notwithstanding registration of the bond to which the same may be or have been attached.

(137) Article III. If the said mortgagor, its successors or assigns, shall at any time hereafter, after demand made, make default or refuse, neglect or omit, for any period exceeding six months, to pay the half yearly interest on the bonds intended to be hereby secured, or any of them, or the principal of said

bonds or any of them, when and as the same shall become due and payable, then and in either such case the said trustee may, and upon a written request of the holders of a majority in amount of the bonds issued upon the security of these presents and then outstanding, shall enter upon and take possession of the railroad, estates, real and personal, and the premises hereby mortgaged or agreed or intended so to be, and operate, use, manage and control the sail railroad, estates, real and personal, and the premises, possession of which may so be taken to the best advantage, and appropriate the net income and proceeds derived therefrom (after deducting the expenses of this trust, including a reasonable compensation to said trustee and its reasonable counsel fees, and such other sum or sums as may be sufficient to indemnify the said trustee against any liability, loss or damage for or on account of any matter or thing done by it in good faith in pursuance of its duty as trustee), to the payment in full without giving preferences, priority or distinction of one bond over another, first to the interest due on, and secondly of the principal of all of said bonds issued upon the security of these presents and then outstanding, in full if the said income and proceeds be sufficient, but if not, pro rata; and the trustee in the same events may, and upon the written requests of the holders of said proportion of bonds, shall, after or without entering upon or taking possession, sell the railroad, estates, real and personal, corporate rights, immunities, franchises and premises hereby mortgaged or agreed or intended so to be, to the highest and best bidder, at public sale, in the city of Baltimore (first giving at least three months' notice of such intended sale by publication to be made twice in each week in at least two daily newspapers published in the said city of Baltimore), and grant and convey the same to the purchasers or purchasers, freed from all and every the trusts hereby created, and without liability on the purchaser's part to see to the application of the purchase money and (after deducting the expenses of the trust and indemnity to the trustee as aforesaid) apply the proceeds of such sale to the pro rata payment of the interest and of the principal of the said outstanding bonds, without any preference of interest over principal or of principal over interest; and in the event of there being in the hands of the trustee any portion of the trust estate under this article, or the proceeds hereof after the payment in full of the principal and interest of the aforesaid bonds, then the trustee shall re-convey, transfer or pay over the same to said mortgagor, its successors or assigns, for its or their sole use and benefit.

Article IV. In the event of any entry upon or taking pos-

session or sale of the railroad, estates, real and personal, and premises hereby mortgaged or agreed or intended so to be, under the powers of Article III., then and in either case the whole principal of each and all of said bonds then outstanding and intended to be hereby secured, shall forthwith, upon the written request of the holders of a majority of said bonds, and not otherwise, be declared by the trustee to have become due and payable, or the said trustee, in the event of the default aforsaid, and without such entry or taking possession, may, upon the written request of the holders of a majority of said bonds, declare the principal of all of the bonds hereby secured to be due and payable, and thereupon proceed to enforce payment thereof by a sale of the property hereby mortgaged, or otherwise; but the said trustee may at any time, upon a like request of the holders of a majority of said bonds waive and cancel any such declaration; it being understood, however, that such waiver or cancellation sholl not affect or modify the rights of the said trustee or of the said bondholders in the event of a subsequent default by the mortgagor.

Article V. The party of the second part, as trustee, or otherwise shall be under no obligation to recognize any person, firm or corporation, as holder or holders, owner or owners of one or more of the bonds secured hereby, or to do, or refrain from doing, any act pursuant to the request or demand of any person or persons, firm or corporation, professing or claiming to be such holder or owner, until such supposed holder or holders shall produce the said bonds and deposit the same with the trustee, or prove his ownershop thereof in some other way to the satisfaction of the trustee, and shall save harmless, and indemnify the trustee, to its full satisfaction, from any and all costs and expenses, outlays and counsel fees and other reasonable disbursements for which it may become liable or responsible on proceeding to carry out such request or demand.

Article VI. No part of the premises hereby mortgaged or agreed or intended so to be, shall be sold under proceedings either at law or in equity by the holder or holders of all or any of the bonds intended to be hereby secured, otherwise than in accordance with the provisions of Articles III. and IV. (any law or usage to the contrary notwithstanding), it being the intention and agreement of the parties for the better securing the largest price for the mortgaged premises in the event of a sale (138) thereof, that the mode of sale hereinbefore provided shall be exclusive of all others; it being understood that nothing contained in these presents shall in anywise limit the right and

power of said trustee to take any proceedings at law or equity for the proper enforcement of this mortgage under the provisions herein contained.

Article VII. That it shall be lawful for the said mortgagor, its successors or assigns, to sell for cash or on credit, or partly for cash or partly on credit, or to exchange any part or parts of the real or personal property hereby granted in mortgage by said company, and to grant, convey, transfer and assign the same to the purchaser or grantee free and discharged from the lien or operation of this indenture, and without liability on the part of such purcaser or grantee for the disposition of the money paid or the property granted or transferred in exchange: Provided, however, that before any sale or exchange of any real estate shall be made, and before any sale or exchange of any personal property exceeding in value the sum of fifty thousand dollars shall be made, the written consent of the trustee for the time being thereto shall be obtained, the said mortgagor hereby covenanting with the said trustee that the proceeds of all such sales or any amount of money equal thereto, shall be forthwith invested either in improving any remaining part of the premises, or in the purchase of bonds of the company hereby secured, at a premium not exceeding five per cent. (which bonds, when so purchased, shall be delivered to and cancelled by said trustee), or in the purchase of other property, real or personal, and free from any other lien or mortgage, which property, as also any that may be acquired in exchange as aforesaid, shall become and be subject to this indenture and mortgage, and to all the trusts including that of sale and exchange herein declared, and shall be conveyed in mortgage to the said trustee for the time being so to be held.

Article VIII. That if the mortgager, its successors or assigns shall, at any time during the continuance of these presents, desire to make any change in the location of any of the terminals or of the tracks or any of the station houses or other buildings or structures upon any part of the mortgaged premises, it shall be lawful for it so to do, and the said trustee, upon conveyance to it under the terms of this mortgage of such new tracks, terminals, station houses, buildings or other structures and the premises on which the same may be erected, is authorized at the request of the mortgagor, to release the former tracks, station houses, buildings and other structures and the premises on which they are erected from the lien of this mortgage, and to execute and deliver any and all instruments necessary and proper to effect such purpose, and the said mortgagor, its succes-

sors or assigns shall also have the right, subject to the limitations hereinbefore fixed, to sell, exchange, or otherwise dispose of any machinery, rolling stock, tools, implements, material or other personal property which may be found unserviceable or unnecessary to the use said mortgagor, the proceeds of such sale or sales, however, to be used in the purchase of other property of a similar general character, which when bought will be subject to the trusts herein declared.

Article IX. That within thirty days after notice in writing to be given by the mortgagor to the said trustee specifying the property intended to be exchanged, leased, sold or otherwise disposed of under Articles VII. and VIII. of this mortgage, and the price or other consideration to be received therefor, said trustee shall serve upon the mortgagor, objections thereto in writing, that such price or other consideration is not a fair and just equivalent for the property to be exchanged, leased or sold, or otherwise disposed of, then in case of the service of such written objections and continued difference of opinion between said mortgagor and said trustee as to the adequacy of such price or other consideration, or the propriety in the interest of the bondholders hereby secured of the exercise in such instance of the powers herein conferred, it shall be the duty of the parties between whom such differences of opinion shall exist, and they are hereby authorized and required to appoint from time to time, an arbitrator or arbitrators to determine the adequacy of such price or other consideration, and the propriety aforesaid of the exercise in such instance of said powers, and in case such arbitrator or arbitrators, or a majority of such arbitrators, if there be more than two, shall determine that such price or other consideration is a fair and just equivalent for the property to be exchanged or sold or otherwise disposed of, and that it is proper that such power should be exercised, said trustee, notwithstanding such written objections, shall execute and deliver such release. Each party shall appoint an arbitrator, and if the two thus appointed fail to agree they shall appoint a third; and in such case, the decision of a majority of the arbitrators shall control.

The mortgagor shall, on the first day of September in each year, until the first day of September, 1934, furnish to said trustee, statements showing in detail, properties sold or exchanged, leased or otherwise disposed of under the provisions of this mortgage, the proceeds of such sale, the properties, if any, received in exchange, and the manner in which said proceeds may have been invested during the preceding year.

(139) Article X. Until some event shall happen upon which the trustee shall, in pursuance of the powers contained in Articles III. or IV. be entitled to take possession of the railroad, estates, real or personal, hereby mortgaged, or agreed or intended so to be, the said mortgagor, its successors and assigns may retain the free control, use and enjoyment, possesion and management thereof.

Article XI. The said mortgagor hereby covenants and agrees with the said trustee, party of the second part, its successor or successors, that it, the party of the first part, or its sucesor or successors, or assigns, from time to time and at all times, upon reasonable request, shall and will, make, execute and deliver, record and file at its own expense, all such further real or chattel mortgages, acts, deeds, conveyances and assurances in law for the better assuring unto the said trustee and its successor or successors in the trust hereby created, upon the trusts and for the purposes herein expresed or intended, all and singular the railroads, steamboats, property, real, personal and mixed, rights, privileges and franchises hereby mortgaged or conveyed in trust, or intended so to be, now owned or possessed, or which hereafter may be acquired by or vested in the said party of the first part, its successor or successors or assigns, as by the said party of the second part, or its counsel, learned in the law, shall be reasonably advised or required.

Article XII. If the said trustee or any successors in the trusts hereby created shall neglect, refuse or become incapable to act in the execution of said trusts, or shall resign the same, then the said mortgagor or the holders of any of the bonds issued under the security of these presents and then outstanding, to the nominal amount of two hundred and fifty thousand dollars, may apply to the Circuit Judge of the United States in and for the District of Maryland, to nominate and appoint some fit and proper trust company or corporation to be selected by him, having its principal place of business in the city of New York, or the city of Baltimore, to be the new trustee or trustees for filling the vacancy so caused, and supplying the place of such trustees so neglecting, refusing, becoming incapable to act, or resigning, which appointment the said judge is hereby requested and authorized to make, and the said trustee or trustees so nominated or appointed shall take upon himself or themselves, the same trusts and have the same powers, and be subject to all the stipulations and conditions of this indenture in the same way as if originally named therein as trustee; and the said trusts, powers, stipulations and conditions, shall extend to, be performed and

executed, by and with reference to such newly appointed trustee or trustees, as they can, may, could or might be by or with reference to the said trustee; and the like nomination and appointment shall and may be carried into effect in like manner from time to time and as often as there may be occasion therefor, and with the same effect as before mentioned.

Article XIII. The trustee named herein shall not, nor shall any future trustee or trustees (unless required by the proportion of bond holders mentioned in Articles III. and IV., in some or one of the events which will entitle such requisition to be made), incur any liability or responsibility whatever in consequence of permitting or suffering the mortgagor to retain or be in possession of the railroad, estates or premises hereby mortgaged, or agreed or intended so to be, or any part thereof, and to use and enjoy the same; nor shall said trustee or any future trustee or trustees, be or become responsible or liable for any destruction, deterioration, loss, injury or damage, which may be done or occur to the railroad or estates hereby mortgaged, or agreed or intended so to be, either by the mortgagor or its agents or servants, or by any other person or person whomsoever, without the consent of such trustee or trustees, nor shall any such trustee or trustees be or become responsible or liable for the recitals of facts herein, nor for any breach on the part of the mortgagor of any of the covenants herein contained, nor for any act of the mortgagor, its agents or servants, nor for any use, matter or thing except their own or his willful and intentional breaches of the trust herein expressed and contained.

Article XIV. If the mortgagor, its successors or assigns shall well and truly pay, or cause to be paid, unto the person or persons, bodies politic or corporate who shall become holders of the bonds intended to be secured thereby, the several and respective sums expressed therein, at the times and places hereinbefore mentioned for payment thereof, together with interest for the same, according to the provisions hereof, and of the said bonds, without any fraud or further delay, then and from thenceforth, as well as this present indenture and the estates hereby granted and conveyed, or hereby agreed so to be, as the said recited obligation shall become void and of no effect, anything hereinbefore mentioned to the contrary thereof notwithstanding, and satisfaction shall be duly entered forthwith by the said trustee, or trustees for the time being, upon the record of this indenture of mortgage.

(140) And this indenture doth further witness, That the

said Baltimore, Chesapeake and Atlantic Railway Company hath, and by these presents doth, constitute and appoint Nicholas P. Bond, of Baltimore city, as its attorney, irrevocable for it and in the name of it, The Baltimore, Chesapeake and Atlantic Railway Company, to acknowledge these presents as the act and deed of it, the Baltimore, Chesapeake and Atlantic Railway Company.

In witness whereof, the said Baltimore, Chesapeake and Atlantic Railway Company has caused to be hereunto affixed its common or corporate seal, and the president of the said company, by virtue of the authority vested in him, has hereunto affixed his signature, and the secretary of the said company has duly attested the execution thereof, this the day and year aforesaid.

Sealed and delivered in the presence of us.

JOHN E. SEARLES,
President.

Attest:

WINTHROP M TUTTLE,
[Corporate Seal.] Secretary.

The Atlantic Trust Company does hereby accept the foregoing trust.

In witness whereof, the said company has caused its corporate seal to be hereunto affixed, duly attested, this first day of September, A. D. 1894.

Signed and sealed in the presence of us.

W. H. MALE,
President.

Attest:

J. S. SYNDAM,
[Corporate Seal.] Secretary.

(141) STATE OF NEW YORK, }
City and County of New York, } ss.:

I hereby certify that on this sixth day of September, A. D. 1894, before me, the subscriber, a notary public of the State of New York, in and for the city and county of New York, personally appeared Nicholas P. Bond, who, being known to me to be the person named in the letter or power of attorney con-

tained in the foregoing indenture of mortgage, and by virtue of the power and authority thereby granted and the exercise thereof, did acknowledge the foregoing mortgage as the act and deed of the Baltimore, Chesapeake and Atlantic Railway Company.

[Notarial Seal.] A. P. ALVORD,
Notary Public, Kings County.
(Certificate filed in New York.)

STATE OF NEW YORK,
City and County of New York, } to-wit:

I hereby certify that on this sixth day of September, in the year 1894, before the subscriber, a notary public of the State of New York, in and for the city and county of New York, personally appeared William H. Male, the president of the "Atlantic Trust Company" of New York, trustee in the foregoing indenture of mortgage, and for and on behalf of said corporation, made oath, in due form of law on the Holy Evangel of Almighty God, that the consideration stated in said instrument is true and bona fide as therein set forth, and that he is the president and agent of said corporation mortgagee under the foregoing instrument.

A. P. ALVORD,
Notary Public Kings County.
Certificate filed in New York Co.

PRINTED RECORDS OF THE COURT OF APPEALS OF MARYLAND.

(142) Filed with Agreed Statement of Facts.

Record. No.

IN THE COURT OF APPEALS OF MARYLAND.

The Baltimore, Chesapeake and Atlantic Railway Company

vs.

The Mayor and City Council of Ocean City.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY.

ROBERT P. GRAHAM, & FITCH, for Appellant; JAS. E. ELLEGOOD, GEO. W. PURNELL, OLIVER D. COLLINS, for Appellees.

Filed December 12, 1898.

APPEAL FROM THE CIRCUIT COURT FOR WORCESTER COUNTY.

The Mayor and City Council of Ocean City

(143) *vs.*

The Baltimore, Chesapeake and Atlantic Railway Company.

In the Circuit Court for Worcester County.

Copy of Docket Entries.

Case 2d.

1897, Oct. 23.—Titling filed.

1898, Feb. 14.—Nar filed; rule plea.

1898, Mch. 14.—Pleas filed; rule rep.

1898, Apr. 1.—Joinder filed; trial.

1898, Oct. 26.—Agreed statement of facts filed.

1898, Oct. 26.—Submitted to court without the intervention of a jury.

1898, Oct. 26.—Plaintiff called and answered.

1898, Oct. 26.—Court finds for plaintiff and assesses the damages at $368.75.

1898, Oct. 26.—Motion for and judgment on finding nisi.

1898, Oct. 26.—Bill of exceptions filed by deft.

1898, Oct. 26.—Order for appeal filed.

Copy of Nar.

(Filed February 14, 1898.)

WORCESTER COUNTY, } *ss:*

1st. The Mayor and City Council of Ocean City, a corporation duly incorporated under the laws of the State
(144) of Maryland, by George W. Purnell and Oliver D. Collins, its attorneys, sues The Baltimore, Chesapeake and Atlantic Railway Company, a corporation duly incorporated under the laws of the State of Maryland, for money payable by the defendant to the plaintiff for goods sold by the plaintiff to the defendant.

2d. And for goods bargained and sold by the plaintiff to the defendant.

3d. And for work done and materials provided by the plaintiff for the defendant at its request.

4th. And for money lent by the plaintiff to the defendant.

5th. And for money paid by the plaintiff for the defendant at its request.

6th. And for money received by the defendant for the use of the plaintiff.

7th. And for money found to be due from the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims therefor the sum of one thousand dollars.

GEORGE W. PURNELL,
OLIVER D. COLLINS,
Attys. for Plaintiff.

Copy of Pleas.

(Filed March 4, 1898.)

STATE OF MARYLAND, } *ss:*
Worcester County. }

The Mayor and City Council of Ocean City, a corporation &c.,

vs.

The Baltimore, Chesapeake and Atlantic Railway Company.

In the Circuit Court for Worcester County.

The defendant, by Graham and Fitch, its attorneys, says:

1st. That the defendant never promised as alleged.

2d. That the defendant was never indebted as alleged.

GRAHAM & FITCH,
Attys. for Defendant.

Copy of Joinder of issue.

(145) (Filed April 11th, 1898.)

The Mayor and Council of Ocean City,	In the Circuit Court for Worcester County.
vs.	
The Baltimore, Chesapeake and Atlantic Railway Company.	

The plaintiff in the above cause joins issue on the pleas of the defendant.

GEO. W. PURNELL &
OLIVER D. COLLINS,
Attys. for Plff.

Copy of Agreed Statement of Facts.

(Filed October 26, 1898.)

The Mayor and City Council of Ocean City,	In the Circuit Court for Worcester County.
vs.	
The Baltimore, Chesapeake and Atlantic Railway Company.	

We, the undersigned, attorneys for the plaintiff and defendant respectively, in the above entitled cause, hereby agree that the following facts shall be considered by the court at the hearing of this cause to the same extent and for the same purposes as though they had been proven in court by competent witnesses and evidence, and that all proper inferences of law and fact may be drawn by the said court from the said facts to the same extent as though the same had been regularly proven at the trial of this cause, hereby waiving all irregularities of pleadings:

First. That on or about the — day of —, in the year eighteen hundred and eighty-six, the Baltimore and Eastern Shore Railroad Company was duly incorporated under the

provisions of an Act of the General Assembly of Maryland, passed at the January Session, eighteen hundred and seventy-six (1876), chapter 242, entitled "An Act to provide (146) for the creation and regulation of incorporated companies in the State of Maryland;" and that afterwards by virtue of chapter 133 of the Act of eighteen hundred and eighty-six (1886) (which said act and chapter it is agreed shall be read and considered by the court to the same entent as though offered in evidence) the powers of the said Baltimore and Eastern Shore Railroad Company were enlarged and increased, and by virtue of section 2, of chapter 133 of the said Acts of 1886, its property, franchises, shares of capital stock and bonds were exempted from all State, county and municipal taxes for the term of thirty years, accounting from the date of the completion of said road between the termini mentioned in said chapter.

Second. The said road was completed between the termini mentioned, on or about the first day of August, in the year eighteen hundred and ninety-one (1891).

Third. By virtue of sections 4 and 5 of the said chapter 133 of the Acts of 1886, the said Baltimore and Eastern Shore Railroad Company was given power to unite, connect and consolidate with any railroad company either in or out of this State, so that the capital stock of the said companies so united, connected and consolidated may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters; and that the Baltimore and Eastern Shore Railroad Company should have power to lease or purchase and operate any railroad or railroads, either in or out of this State, for the purpose of carrying on their business, and any other railroad in the State shall have the right to lease or sell its property to the said Baltimore and Eastern Shore Railroad Company.

Fourth. That on or about the thirtieth day of June, in the year eighteen hundred and ninety, the Wicomico and Pocomoke Railroad, and all the property, franchises, etc., of the Wicomico and Pocomoke Railroad Company was sold to and purchased by the Baltimore and Eastern Shore Railroad Company, by virtue of the powers contained in the said chapter 133 of the Acts of 1886, and consolidated therewith.

Fifth. And afterwards, to-wit: on the first day of

July, in the year eighteen hundred and ninety, the said Baltimore and Eastern Shore Railroad Company, by a duly executed, delivered and recorded mortgage or deed of trust, conveyed all and singular its property, franchises, rights, privileges and immunities, including therein all the railroad and other property, franchises, etc., formerly belonging to the said Wicomico and Pocomoke Railroad Company, to the Atlantic Trust Company, in trust to secure the payment of the principal and interest of certain bonds in said mortgage or deed of trust mentioned.

Sixth. And afterwards, to-wit: in the month of August, in the year eighteen hundred and ninety-four, under (147) foreclosure of said mortgage, a sale was made of all the railroad in said mortgage mentioned, together with all the rights, privileges, franchises and immunities of the Baltimore and Eastern Shore Railroad Company, and including the railroad formerly belonging to the Wicomico and Pocomoke Railroad Company as aforesaid, which said sale was made by decree of foreclosure and sale, passed by the Circuit Court of the United States in and for the District of Maryland, in a cause pending in said court, wherein the Scranton Steel Company and the Atlantic Trust Company were complainants, and The Baltimore and Eastern Shore Railroad Company was defendant, and which said sale was afterwards duly ratified and confirmed by said court.

Seventh. That at said sale Nicholas P. Bond became purchaser of all the said railroad and other property, rights, privileges, franchises and immunities then and there sold. And in pursuance and by virtue of sections 187, 188, 189 and 190 of Article 23, of the Code of Public General Laws of Maryland, did, together with his associates, form a corporation for the purpose of owning, possessing, maintaining and operating such railroad under the name of "The Baltimore, Chesapeake and Atlantic Railway Company," by filing in the office of the Secretary of State a certificate in the form required by section 187 of Article 23 aforesaid.

Eighth. And it is further agreed that sections 187, 188, 189 and 190 of the said Article 23, of the Code of Public General Laws of Maryland, shall be considered a part of this agreement.

Ninth. That part of the property of the said Baltimore, Chesapeake and Atlantic Railway Company, which was originally part of the property of the Wicomico and Pocomoke Railroad Company, is situated in the town of

Ocean City, Worcester county, Maryland, the said town being duly incorporated under the laws of the State of Maryland.

Tenth. That the said plaintiffs assessed the property aforementioned, situate in the said town of Ocean City, for taxes for the years 1892, 1893, 1894, 1895 and 1896, and that the said railroad company, the defendant in this cause, refuses to pay the same, claiming the exemption contained in section 2, of chapter 133 of the said Acts of 1886, relieved them from paying said taxes, to recover which said taxes this suit was brought.

Eleventh. That the amounts claimed for taxes are as follows:

For 1892, $60.00 and interest from Jany. 1, 1893.
For 1893, $60.00 and interest from Jany. 1, 1894.
For 1894, $60.00 and interest from Jany. 1, 1895.
For 1895, $60.00 and interest from Jany. 1, 1896.
For 1896, $60.00 and interest from Jany. 1, 1897.

—and should the court hold that [that] the said company is responsible for said taxes, then the said amount is the (148) amount for which judgment shall be entered for plaintiff, and if the court shall find that the defendant is not liable for said taxes, then the verdict and judgment shall be for the defendant.

Twelfth. It is hereby agreed by the parties to this agreement that either party shall have the right to appeal from the decision of the court upon the above agreement of facts, and the right of such appeal is hereby reserved.

JAMES E. ELLEGOOD,
GEO. W. PURNELL and
OLIVER D. COLLINS,
Attys. for Plaintiff.
ROBERT P. GRAHAM,
Atty. for Defendant.

1898, October 26.—Finding of court was for plaintiff, and damages were assessed at $368.75; and on the same day there was motion for and judgment on finding nisi as per docket entries.

Copy of Bill of Exceptions.

(Filed 26 Octo., 1898.)

Mayor and City Council of Ocean City,	No. 13, Trials.
vs.	In the Cir. Ct. for Wor. Co.
Baltimore, Chesapeake and Atlantic Ry. Co.	Oct. Term, 1898.

At the trial of the issues joined in the above case, the plaintiff and defendant, in lieu of testimony, offered the following agreed statement of facts, to wit: (see copy of same heretofore fully recited).

And thereupon, the defendant offered the two following prayers:

1. The defendant prays the court to rule, as a matter of law, that upon the facts in this case as appears in the agreed statement of facts that the exemption given by chap. 133 of the Acts of 1886, to the Baltimore and Eastern Shore Railroad Company, now applies to the Baltimore, Chesapeake—Railway Company, and that portion of the said property as now lies within the corporate limits of the plaintiff, and the plaintiff therefore cannot recover in this case.

2. The defendant prays the court to rule as a matter of law, that the property upon which the taxes sued for in (149) this case were levied, is exempt from taxation as a part of the property of the Baltimore, Chesapeake and Atlantic Railway Company which was formerly the Baltimore and Eastern Shore Railroad Company, by virtue of chapter 133 of the Acts of 1886, and the plaintiff cannot recover.

And the court refused to grant them or either of them and rejected them both. The defendant excepted and prayed the court to sign and seal this their bill of exceptions.

Witness our hands and seals, this twenty-sixth day of October, 1898.

CHAS. F. HOLLAND, [Seal]
HENRY LLOYD, [Seal]

Order for Appeal.

(Filed 26th Oct., 1898.)

Mayor, etc., Ocean City,	No. 13, Trials.
vs.	In the Circuit Court for Worcester Co.
B., C. & A. Ry. Co.	Oct. Term, 1898.

Mr. CLERK :—Please enter an appeal in the above case.

ROBERT P. GRAHAM,
Attorney for Defendant.

Plaintiff's costs	$10 60
Defendant's costs	11 40
	$22 00

STATE OF MARYLAND, Worcester County, } to-wit :

I, Francis Henry Purnell, Clerk of the Circuit Court for Worcester county, Maryland, hereby certify that the aforegoing is a true, full and complete record of the proceedings in the therein entitled case, as the same remains of record in this court.

[Seal's Place.] In testimony whereof, I hereto set my hand and affix the seal of the Circuit Court for Worcester county, this ninth day of December, A. D., 1898.

FRANCIS HENRY PURNELL,
Clerk of the Circuit Court for Worcester County.

(150) Record. No.

IN THE COURT OF APPEALS OF MARYLAND.

No. 141 90

The Baltimore, Chesapeake and Atlantic Railway Company

vs.

The County Commissioners of Wicomico County.

No. 142 91

The County Commissioners of Wicomico County

vs.

The Baltimore, Chesapeake and Atlantic Railway Company.

Judgment.

Term.

CROSS-APPEAL FROM THE CIRCUIT COURT FOR WICOMICO COUNTY.

GRAHAM & FITCH, for Railway Company; JAMES E. ELLEGOOD, G. GRIER RATCLIFF, for County Commissioners.

Filed September 29th, 1900.

APPEAL FROM THE CIRCUIT COURT FOR WICOMICO COUNTY.

STATE OF MARYLAND,
(151) Wicomico County, } to-wit:

At a Circuit Court of the First Judicial District of the State of Maryland, begun and held for Wicomico county, at Salisbury, in said county, on the first Monday in July, being the second day of the same month, in the year of our Lord, nineteen hundred, were present:

The Honorable Henry Page, Chief Judge; the Honorable Chas. F. Holland, Associate Judge; the Honorable Henry Lloyd, Associate Judge; Jesse H. Brattan, Sheriff; James T. Truitt, Clerk.

Among others were the following proceedings, to-wit:

The County Commissioners of Wicomico County

vs.

The Baltimore, Chesapeake and Atlantic Railway Company.

Be it remembered that heretofore, to-wit: on the 29th day of January, in the year nineteen hundred, the County Commissioners of Wicomico county filed in the Circuit Court for Wicomico county here there declaration against the Baltimore, Chesapeake and Atlantic Railway Co., to-wit:

NAR.

(Filed January 29, 1900.)

March Term, 1900. Circuit Court for Wicomico County.

The County Commissioners of Wicomico county, Maryland, plaintiff, by James E. Ellegood and G. Grier Ratcliff, its attorneys, sues the defendant, The Baltimore, Chesapeake and Atlantic Railway Company, a body corporate of the State of Maryland, for money payable by the defendant to the plaintiff.

(152) 1st. For goods bargained and sold, or sold and delivered by the plaintiff to the defendant.

2nd. And for work and labor done by the plaintiff for the defendant at its request.

3rd. And for money paid by the plaintiff for the defendant at his request.

4th. And for money lent by the plaintiff to the defendant.

5th. And for money had and received by the defendant for the use of the plaintiff.

6th. And for the use and occupation by the defendant, by permission of the plaintiff, of messuages and lands of the plaintiff.

7th. And for money found to be due from the defendant to the plaintiff on accounts stated between them.

8th. And for money due and owing the plaintiff by the defendant for taxes for the year 1896, to wit: the sum of $8,073.84, with interest from the first day of January, 1897.

9th. And for money due and owing to the plaintiff by the defendant for taxes for the year 1897, to wit: the sum of $7,524.91, with interest from the first day of January 1898.

10th. And for money due and owing to the plaintiff by the defendant for taxes for the year 1898, to wit: the sum of $7,341.93 with interest from the first day of January 1899

11th. And for money due and owing to the plaintiff by the defendant for taxes for the year 1899, to wit: the sum of $7,341.93, with interest from the first day of January, 1900.

And the plaintiff claims therefor $60,000.00.

JAMES E. ELLEGOOD,
G. GRIER RATCLIFF,
Attorneys for Plaintiff.

Plaintiff's Bill of Particulars.

(Filed March 9, 1900.)

The County Commissioners of Wicomico County	Circuit Court for Wicomico County.
vs.	
The Baltimore, Chesapeake and Atlantic Railway Company.	

The following is a bill of the particulars of the plaintiff's claim against the defendant for taxes due and owing the plaintiff as hereinbefore set forth.

JAMES E. ELLEGOOD,
G. GRIER RATCLIFF,
Attorneys for Plaintiff.

Assessment in Pittsville District, No. 4.

(153)

To 8.30 miles of main track @ $3,850 per mile	$31,955.00
" .53 " side " @ 2,500 " "	1,325.00
" Station at Parsonsburg	300.00
" Tool and freight house at Pittsville	100.00
" Station at Willards	100.00
Total	$ 33,780.00

Assessment in Parsons District, No. 5.

To 6.80 miles main track @ $3,850 per mile	$26,180.00
" 1.30 miles side track @ $2,500 per mile	3,250.00
" Station building	1,000.00
" Car house	2,000.00
" Water tanks	200.00
" Station at Phillips	100.00
" Nine locomotives	22,500.00
" Twenty passenger coaches	30,000.00
" Four combination cars	4,800.00
" Two cabooses	400.00
" One maintenance of way car	100.00
" One open excursion car	100.00
" Forty-seven box cars	9,400.00
" Twenty-seven flat cars	4,000.00
" Steamer Cambridge	52,000.00
" " Avalon	52,000.00
" " Ida	48,000.00
" " Joppa	48,000.00
" " Enoch Pratt	28,000.00
" " Tred Avon	28,000.00
" " Pocomoke	44,000.00
" " Eastern Shore	40,000.00
" " Tivoli	52,000.00
" " Nanticoke	32,000.00
" " Choptank	16,000.00
" " Tangier	28,000.00
" " Maggie	16,000.00
" " Helen	12,000.00
Total	$600,030.00

Assessment in Salisbury District, No. 9.

To 4.30 miles main track @ $3,850	$16,555.00
" .94 miles side track @ 2,500	2,350.00
" Station at Byrd's	150.00
" Station at Fulton	400.00
Total	$19,455.00

Assessment in Quantico District, No. 2.

(154)

To 2.35 miles main track @ $3,850	$ 9,047.50
" .28 miles side track @ 2,500	700.00
" Station at Hebron	250.00
Total	$ 9,997.50

Assessment in Barren Creek District, No. I.

To 8.20 miles main track @ $3,850	$31,570.00
" .18 miles side track @ 2,500	450.00
" Sation at Mardela Springs.....	400.00
Total.....	$32,420.00

Total Amount of Assessments as Follows :

	Assessment.	Tax.
Total amount of assessment for 1896...	$695,782	
Rate of levy for 1896, 86¼c.		$6,001.12
Interest from Jan. 1st, 1897.		
Total amount of assessment for 1897...	695,782	
Rate of levy for 1897, 82½c.		5,722.81
Interest from Jan. 1st, 1898.		
Total amount of assessment for 1898...	695,782	
Rate of levy for 1898, 80¼c.		5,583.65
Interest from Jan. 1st, 1899.		
Total amount of assessment for 1895...	695,782	
Rate of levy for 1899, 80¼c.		5,583.65
Interest from Jan. 1st, 1900.		

JAMES E. ELLEGOOD,
G. G. RATCLIFF,
Attorneys for Plaintiff.

PLEA.

(Filed March 29, 1900.)

In the Circuit Court for Wicomico County. Trials, March Term, 1900.

The defendant, (by leave of the court first had and obtained) by Graham & Fitch, its attorneys, says :

1. That it never was indebted as alleged.

2. That it never promised as alleged.

3. And for a third plea to the said declaration, the defendant says, that the several main and side tracks, sta-
(155) tions, station buildings, tool, freight and car houses, water tanks, locomotives, passenger coaches, combination, caboose, freight, maintenance of way and flat cars and steamers in the plaintiff's declaration and bill of particulars mentioned, were, on the 1st day of August, 1894, and at the time of the sale hereinafter mentioned, the property and constituted the railroad of the Baltimore and Eastern Shore Railroad Company, a corporation duly incorporated

under the laws of the State, and the said railroad was and is situated wholly within the State; and that said property was, by virtue of the provisions of the Act of the Legislature of this State of 1886, Chapter 133, exempt from all State, County and Municipal taxation for the term of thirty years from the date of the completion of said railroad between said terminii mentioned in the charter of the said railroad company, and that the said road was so completed between said terminii on or about the 1st day of August, 1891.

That afterwards, and on or about the 1 day of August, 1894, the said railroad of the said Baltimore and Eastern Shore Railroad Company was sold by a decree of the Circuit Court of the United States for the District of Maryland, under certain mortgage foreclosure proceedings, and was purchased by certain persons who, subsequently, with others forms this defendant corporation, whereupon and whereby, in pursuance of the provisions of the Act of the of the Legislature of this State of 1886, Chapter 134, this defendant succeeded to and become and is possessed of all the powers, rights, immunities, privileges and franchises which were possessed and enjoyed by the said Baltimore and Eastern Shore Railroad Company previous to such sale aforesaid, and the said property so purchased as aforesaid, and now owned by this defendant, is exempt from alleged taxes mentioned in said declartion and bill of particulars.

4. And for a further plea to so much of said declaration and bill of particulars as relates to taxes on the track of the defendant from Salisbury to the Nanticoke river, and including the side tracks, station buildings, water tanks, car houses, stations, locomotives, cars of every kind, and steamers mentioned in the said bill of particulars as assessed in Parsons District, No. 5; Salisbury District, No. 9; Quantico District, No. 2, and Barren Creek District, No. 1. This defendant says that the said districts and the said property in said bill of particulars stated to be assessed therein respectively, are between the terminii (formerly of the Baltimore and Eastern Shore Railroad Company) mentioned in the Act of the Legislature of this State of 1896, Chapter 133, and were, by the provisions of said act, exempted from all State, County and Municipal taxations for the term of thirty years from the date of completion of its road between said terminii by the said Baltimore and Eastern Shore Railroad Company, and that said road was so completed on or about the 1st day of August, 1891, at which date the said exemption commenced and took effect, and has continued hitherto, and still continues.

That afterwards, on or about the 1st day of August, 1894, the said railroad then being the property of the said Baltimore and Eastern Shore Railroad Company was sold by a decree of the Circuit Court of the United States for the District of Maryland, under certain mortgage foreclosure proceedings, and was purchased by certain persons who, with others, (their associates) formed this defendant corporation, whereupon this defendant, by virtue of the provisions of the Act of the Legislature of this State of 1886, Chapter 134, succeeded to and became, and now is (156) possessed of all the powers, rights, privileges and franchises which were possessed and enjoyed by the said Baltimore and Eastern Shore Railroad Company previous to said sale, and the defendant says that, by virtue of the premises, and the said purchase, and the acts subsequent thereto, and the said Acts of the Legislature and the laws of this State in its behalf, the said property in this plea mentioned, now owned as aforesaid by this defendant, is exempt from taxation.

5. For a further plea to said declaration the defendant says that the alleged taxes for the years 1896, 1897, 1898 and 1899, respectively, in said declaration and the said bill of particulars mentioned, were never legally assessed or levied for the said years respectively.

6. And for a further plea to the 8th count of said declaration, the defendant says that the said alleged taxes for the year 1896 in said count mentioned, was never legally assessed and levied by the Board of County Commissioners of said Wicomico County.

7. And for a further plea to the 9th count of said declaration, the defendant says that the alleged taxes for the year 1897, in said count mentioned, were not assessed and levied by the Board of County Commissioners of said Wicomico County in the said year 1897.

8. And for a further plea to the 10th count of said declaration, the defendant says that the said alleged taxes for the year 1898, in said count mentioned, were not assessed and levied by the Board of County Commissioners of said Wicomico county in the said year 1898.

9. And for a further plea to the 11th count of said declaration, the defendant says that the said alleged taxes for the year 1899, in said count mentioned, were not legally assessed and levied by the Board of County Commisssioners of said Wicomico county.

GRAHAM & FITCH,
Attorneys for Defendants.

Joinder of Issue and Replication.

(Filed March 30, 1900.)

In the Circuit Court for Wicomico County.

March Term, 1900.

1st. The plaintiff, by James E. Ellegood and G. Grier Ratcliff, its attorneys, joins issue as to the defendant's first and second pleas filed in the above entitled cause.

2'd. And for the replication to defendant's third plea, this plaintiff says that the property of the defendant is not exempt from the taxes mentioned in the declaration and bill of particulars filed on behalf of the plaintiff.

3'd. And for replication to the fourth plea, this plaintiff says that the property mentioned in the defendant's fourth plea is not between the terminii of the railroad formerly known as the Baltimore & Eastern Shore Railroad Company, but that a large part of the property (157) described and referred to in the said fourth plea, has been acquired by the said defendants since the first day of August, 1894, that is, since the sale of the Baltimore & Eastern Shore Railroad Company under the decree of foreclosure, and that for 2nd replication to the said fourth plea, the plaintiff says that the property mentioned in the said fourth sourth plea is not, nor is any of it, exempt from taxation under the laws of the State of Maryland.

4th. And for a replication of the fifth plea at the defendants filed in the above entitled cause, the plaintiff says that the taxes for the years 1896, 1897, 1898 and 1899, respect*fully* mentioned in the declaration and bill of particulars were legally assessed and levied for the said years respectively.

5th. And, for replication to the defendants sixth, seventh, eighth and ninth pleas, the plaintiff says that the taxes for the year 1896, 1897, 1898 and 1899, mentioned in the eighth, ninth, tenth and eleventh counts of the plaintiff's declaration were legally assessed and levied on the part of the County Commissioners of Wicomico County for the said years respectively.

JAMES E. ELLEGOOD,
G. GRIER RATCLIFF,
Attorneys for Plaintiff,

* * * * * * * *

(161) At the July Term, to-wit: July 3, 1900. Submited to the court without intervention of jury.

At July Term, to-wit: July 3, 1900. Argument. Held sub curia.

At July Term, to-wit: Sept. 20, 1900. Court finds for the plaintiff, and assesses the damages at $5,227.00.

At July Term, to-wit: Sept. 20, 1900. Judgment nisi on the finding for the snm of $5,227.00 with interest from date and costs.

1900, Sept. 25. Judgment on verdict for the amount of damages, the sum of $5,227.00, with interest from date and costs.

And the defendants aforesaid, by their attorneys aforesaid, during the progress of the trial of this cause noted exceptions, which exceptions were afterwarde, to-wit: from the 20th day of September 1900 signed and sealed by the court, and which said exceptions signed and sealed as aforesaid, were on the 20th day of September, in the year aforesaid, filed in this court here, in the words following, to wit:

In the Circuit Court for Wicomico County, No. 8 Trials, July Term 1900.

At the trial of the above entitled case, the plaintiff and defendant offered in evidence the agreed statement of facts filed in this case on the 30th of June 1900, which was as follows:

We, the undersigned, attorneys for the plaintiff and defendant respectively, in the above entitled cause, hereby agree that the following facts shall be considered by the court at the hearing of this cause to the same extent and for the same purposes as though they had been proven in court by competent witnesses and evidence, and that all proper references of law and fact may be drawn by the said court from the said facts to the same extent as though the same had been regularly proven at the trial of this cause, hereby waiving all irregularities of pleadings:

First. That on or about the — day of —, in the year eighteen hundred and eighty-six, the Baltimore and Eastern Shore Railroad Company was duly incorporated under the provisions of an Act of the General Assembly of Maryland, passed at the January Session, eighteen hundred and seventy-six chapter 242, entitled "An Act to provide for the creation and regulation of incorporated companies in the State of Maryland;" and that afterwards

by virtue of chapter 133 of the Act of eighteen hundred and eighty-six (1886), (which said act and chapter it is agreed shall be read and considered by the court to the same entent as though offered in evidence) the power of the said Baltimore and Eastern Shore Railroad Company were enlarged and increased, and by virtue of section 2, of chapter 133 of the said Acts of 1886, its property, franchises, shares of capital stock and bonds were exempted from all State, county and municipal taxes for the term of thirty years, accounting from the date of the completion of said road between the termini mentioned in said chapter.

Second. The said road was completed between the termini mentioned, on or about the first day of August, in the year eighteen hundred and ninety-one (1891).

(162) Third. By virtue of sections 4 and 5 of the said chapter 133 of the Acts of 1886, the said Baltimore and Eastern Shore Railroad Company was given power to unite, connect and consolidate with any railroad company either in or out of this State, so that the capital stock of the said companies so united, connected and consolidated may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters; and that the Baltimore and Eastern Shore Railroad Company should have power to lease or purchase and operate any railroad or railroads, either in or out of this State, for the purpose of carrying on their business, and any other railroad in the State shall have the right to lease or sell its property to the said Baltimore and Eastern Shore Railroad Company.

Fourth. That on or about the thirtieth day of June, in the year eighteen hundred and ninety, the Wicomico and Pocomoke Railroad, and all the property, franchises, etc., of the Wicomico and Pocomoke Railroad Company was sold to and purchased by the Baltimore and Eastern Shore Railroad Company, by virtue of the powers contained in the said chapter 133 of the Acts of 1886, and conveyed by deed to the said Baltimore and Eastern Shore Railroad Company by deed dated the 30th day of June 1890 and duly recorded.

Fifth. And afterwards, to-wit: on the first day of July, in the year eighteen hundred and ninety, the said Baltimore and Eastern Shore Railroad Company, by a duly executed, delivered and recorded mortgage or deed of

trust, conveyed all and singular its property, franchises, rights, privileges and immunities, including therein all the railroad and other property, franchises, etc., formerly belonging to the said Wicomico and Pocomoke Railroad Company, to the Atlantic Trust Company, in trust to secure the payment of the principal and interest of certain bonds in said mortgage or deed of trust mentioned.

Sixth. And afterwards, to-wit: in the month of August, in the year eighteen hundred and ninety-four, under foreclosure of said mortgage, a sale was made of all the railroad in said mortgage mentioned, together with all the rights, privileges, franchises and immunities of the Baltimore and Eastern Shore Railroad Company, and including the railroad formerly belonging to the Wicomico and Pocomoke Railroad Company as aforesaid, which said sale was made by decree of foreclosure and sale, passed by the Circuit Court of the United States in and for the District of Maryland, in a cause pending in said court, wherein the Scranton Steel Company and the Atlantic Trust Company was defendant, and which said sale was afterwards duly ratified and confirmed by said court.

Seventh. That at said sale Nicholas P. Bond became the purchaser of all the said railroad and other property, rights, privileges, franchises and immunities then and there sold. And in pursuance and by virtue of sections 187, 188, 189 and 190 of Article 23, of the Code of Public General Laws of Maryland, did, together with his associates, form a corporation for the purpose of owning, possessing, maintaining and operating such railroad under the name of "The Baltimore, Chesapeake and Atlantic Railway Company," by filing in the office of the Secretary of State a certificate in the form required by section 187 of Article 23 aforesaid.

(163) Eighth. And it is further agreed that sections 187, 188, 189 and 190 of the said Article 23, of the Code of Public General Laws of Maryland, shall be considered a part of this agreement.

Ninth. That that part of the road-bed of the said Baltimore, Chesapeake & Atlantic Railway Company, which is situated in Parsons and Pittsburg Election Districts, Wicomico county, and so assessed, was a part of the property formerly belonging to the Wicomico and Pocomoke Railroad Company, and that part which is assessed as being in Salisbury, Quantico, Barren Creek Districts, was built and constructed under the charter granted to the Baltimore and Eastern Shore Railroad Company.

Tenth. That the said Baltimore, Chesapeake and Atlantic Railway Company claims and has always claimed all of its property as exempt from taxation, but scheduled for taxation certain wharf property of defendant and has always submitted to taxation on the same.

Eleventh. That the town of Salisbury, Wicomico county, and State of Maryland, is the home office or principal office of the Baltimore, Chesapeake & Atlantic Railway Company.

Twelfth. That the property mentioned and described in the bill of particulars filed by the plaintiff in the above cause, is the property of the defendant corporation and has been the property of the same since the 4th day of August, 1894, to the persent time.

Thirteenth. That the said property was not assessed by the assessors of Wicomico county under the provision of the Act of 1896, nor was it attempted to be assessed by the County Commissioners of Wicomico county under the act at any time before the 14th day of November, 1899; and that the said property was not, nor was any of it, returned by the defendant to the assessors, or the County Commissioners of the said county, for the purpose of assessment and taxation under Chapter 120 of the Act of 1896, in any of the schedules of the real and personal property, but the same was omitted from each and every list or schedule of real and personal property, returned by the said defendant, nor has the same at any time been listed by the said defendant for the purpose of taxation under said act. But after the return of the schedule or lists of property admitted by the said defendant corporation to be taxable, the attorney and agent for the defendant, prior to the levy of 1897, and while the said County Commissioners were sitting at the Board of Control and review, under the said Chapter 120 of the Act of 1896, and appear before the said County Commissioners sitting at their said Board of Control and review, and claim the property so omitted, was exempt from taxation under its Charter and the then attorney for the County Commissioners advised that the said property was so exempt as claimed by the defendant corporation. The Commissioners thereupon held the matter in abeyance and came to no final conclusion until November, 1899, when after taking *fur*legal counsel, they came to the conclusion that the same was liable to taxation and not exempt, they thereupon decided to tax the said property and gave notice under section 145 of Article 81 of the Code of Public General Laws of their intention to place the same

same upon the tax books of the county and levy an assessment thereon.

Fourteenth. That on or about the 2nd day of November, the County Commissioners gave due notice to the said defendant of its intention to assess all the property of this defendant, and gave notice to the defendant to appear before the County Commissioners on the 14th day of November 1899, in order that the property might be assessed in pursuance of said notice.

Fifteenth. That pursuant to said notice, the said defendant, by its agent and attorney, appeared before the County Commissioners and objected to the said assessment, but at their request, rendered to the said County Commissioners what the defendant believed to be the true valuation of the said property. The said property was then placed upon the assessment books of Wicomico county for the purpose of taxation for the years 1896, 1897, 1898 1899, and was thereupon assessed against the protest of the said defendant, but with its knowledge. And the levy was then made upon the said assessment for the several years by the said County Commissioners.

Sixteenth. That the said County Commissioners then placed the said taxes as per the levy as shown by the bill of particulars for the said years 1896, 1997, 1898 and 1899, in the hands of the collectors of the taxes for the said years and that the said collectors made demand of the said defendant for the payment of said taxes aforesaid, but the said defendant refused to pay the same or any part thereof, and still does refuse to pay the same or any part thereof.

Seventeenth. That the rate or proportion of taxes to be raised for the county of Wicomico as declared by the County Commissioners during and for the years 1896, 1897, 1898 and 1899 respectively was as follows:

For the year 1896,	rate 86¼	cents per	$100.00
" " 1897,	rate 82¼	"	100.00
" " 1898,	rate 80¼	"	100.00
" " 1899,	rate 80¼	"	100.00

as per Bill of Particulars filed in the above entitled cause; and should the court be of the opinion that the defendant is liable for the taxes claimed, or any part of them, then the court may give judgment for the plaintiff for such amount thereof as the court may find the defendant liable for. And if the court shall find that the defendant was not liable for any of the said taxes, then they may give judgment for the defendant.

Eighteenth. That the assessment as per bill of particulars under the rolling stock of the said Defendant Company is the valutation of all the rolling stock of the said Defendant Company which has never been returned to the State Tax Commissioner for distribution as per Act of 1896.

Nineteenth. It is hereby agreed by the parties to this agreement that either party shall have the right to appeal from the decision of the court upon the above agreement of facts, and the rights of such appeal is hereby reserved.

JAS. E. ELLEGOOD,
G. G. RATCLIFF,
Attorneys for Plaintiff.
GRAHAM & FITCH,
Attorneys for Defendant.

(165) The defendant offered the following prayer:

1. The defendant prays the court to rule as a matter of law that, upon the pleading and evidence in this case, there is no legally sufficient evidence which entitled the plaintiff to recover.

2. The defendant prays the court, as a matter of law, that the plaintiff had no authority under the law to make a levy and assessment on the defendant's property in November, 1899, for account of the years 1896, 1897, 1898 and 1899, or either of them, and is they shall find that there was no assessment of defendant's property for taxation, and no levy of taxes made thereon prior to the said months of November, 1899, then the plaintiff cannot recover.

The defendant prays the court to rule as a matter of law, that the defendant's property mentioned in the proceedings in this case is exempt from taxation, and the plaintiff cannot recover.

4. The defendant prays the court to rule as a matter of law, that the portion of the defendant's property mentioned in the pleadings in this case, located and situated between Salisbury and the western terminii of the defendant's railroad, is exempt from taxation, and the plaintiff cannot recover as to such property.

5. The plaintiff prays the court to rule as a matter of law, that the assessment and levy mentioned in the pleadings in this case, was illegally made and without authority of law, and that their plaintiff cannot recover in this action.

All of which said prayers the court rejected and granted its own motion the following prayer in lieu of all the prayers of the defendant.

Court's Instruction.

That the plaintiff had authority under the law to make an assessment of the defendant's property in November, 1899, for the year 1899 subject to the liability for taxes levied in July, 1899, to which action of the court the defendant excepted, and prays the court to sign and seal this, their bill of exception, which the court, on the 20th day of Sept., nineteen hundred, has accordingly done.

HENRY PAGE, [Seal]
CHAS. F. HOLLAND, [Seal]

* * * * * * * *

(169) Thereupon the defendant offered the following prayer:

"The defendant asks the court to rule as a matter of law, that it was the duty of the county commissioners of Wicomico county, (acting as a board of review) after having completed the assessment of the rolling stock of the defendant company in each of the years for which taxes is claimed thereon in plaintiff's bill of particulars, to have reported to the State Tax Commissioner the total assessment or valuation of the said rolling stock made in said Wicomico county, so that the said State Tax Commissioner could make the apportionment and division of said rolling stock, directed by the Act of 1896, Chap. 140, and their failure so to do debars them from recovering upon that item of their bill of particulars."

Which the court granted, to which ruling of the court the plaintiff excepted, and prays the court to sign and seal this, its bill of exception, which is accordingly done this 29th day of September, 1900.

HENRY PAGE, [Seal]
CHAS. F. HOLLAND, [Seal]

Order for Appeal, Filed September 20th, 1900, to-wit:

No. 8 Trials. In the Circuit Court for Wicomico County.

James T. Truitt, Clerk.

Please enter an appeal in the above case and send a copy of the record to the Court of Appeals of Maryland.

GRAHAM & FITCH,
Attorneys for Defendant.

(170) Order for cross appeal filed on part of plaintiff filed September 20th, 1900, to-wit:

In the Circuit Court for Wicomico County, No. 8 Trials, July Term, 1900.

James T. Truitt, Clerk:—Please enter cross appeal on part of plaintiff.

JAMES E. ELLEGOOD,
G. GRIER RATCLIFF,
Attorneys for Plaintiff.

STATE OF MARYLAND, Wicomico County, } to-wit:

I, James T. Truitt, Clerk of the Circuit Court for Wicomico county, do hereby certify that the foregoing is a full, true and entire transcript taken from the record and proceedings of the said court in the therein entitled cause.

Seal of Circuit Court for Wicomico Co.

In testimony whereof I have hereto set my hand and affix the seal of the Circuit Court for said county this twentieth day of September, 1900.

JAMES T. TRUITT,
Clerk of the Circuit Court for Wicomico County.

Plaintiff's costs, $21.05. Defendant's costs, $17.10.

JAMES E. ELLEGOOD,
G. GRIER RATCLIFF,
Attorneys for Plaintiff.
GRAHAM & FITCH,
Attorneys for Defendant.

Mem. of the Clerk:—By agreement of counsel certain portions of the printed record have been omitted from this record. See stipulation on page 204.

JAS. W. CHEW, Clerk.

OPINION OF COURT.

(171) Filed March 21, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. IN EQUITY.

Samuel Bancroft, Jr.,
vs.
The County Commissioners of Wicomico County, and others.

MORRIS, District Judge:

This is a bill in equity filed by Samuel Bancroft, Junior, a citizen of Delaware, who is a holder of mortgage bonds issued by the Baltimore, Chesapeake & Atlantic Railway Company against the Board of County Commissioners of Wicomico County, Maryland, and the five citizens of Maryland who constitute that Board.

The object of the bill is to enjoin the defendants from levying and collecting taxes upon property of the Baltimore, Chesapeake and Atlantic Railway Company which the plaintiff claims to be exempt by the law of Maryland from taxation, and the imposition and collection of which taxes, the plaintiff alleges, will impair the obligation of a contract between the State of Maryland and the Eastern Shore Railroad Company, arising out of the Act of the General Assembly of Maryland of 1886, Chapter 133, and to which the Baltimore, Chesapeake and Atlantic Railway Company, as the purchaser of said railroad, claims to be entitled under section 188 of Article 23 of the Maryland Code.

(172) Questions of law similar to those raised by this bill of complaint were considered in a prior litigation between the Baltimore, Chesapeake and Atlantic Railway Company itself and the Mayor and City Council of Ocean City, 89 Md., page 89, and also in a case between the same railway company and the County Commissioners of Wicomico county, 93 Md., page 113, and in those cases the Court of Appeals of Maryland decided adversely to the contention of the complainant in this case.

The questions with regard to the jurisdiction of this court were heretofore considered on a demurrer, and it was held that the diverse citizenship gave the court jurisdiction; that the allegations that the trustee under the mortgage was a non-resident of Maryland, and refused to proceed in this behalf except upon

conditions with which the complainant was unable to comply, were sufficient to give the complainant standing to file this bill. It was further held that the complainant, claiming under the mortgage, was not bound by the judgment against the railway company, to which no one claiming under the mortgage was a party, and the complainant was, therefore, not estopped as by *res judicata*.

Keokuk & Western R. R. vs. *Missouri*, 152 U. S., 301, 313-314.

The present case is now submitted for final hearing upon bill, answer and an agreed statement of facts.

The Baltimore and Eastern Shore Railroad Company was first duly incorporated, under the general incorporation law of (173) Maryland (Act of 1876, Chapter 242), and afterwards its rights, privileges, franchises and immunities were enlarged and confirmed by an Act of the General Assembly of Maryland, passed in 1886, Chapter 133.

The Act of 1886, Chapter 133, after reciting that the Baltimore & Eastern Shore Railroad Company had been incorporated under the general incorporation law for the purpose of building, equipping, maintaining and working a railroad from the shores of Eastern Bay, in Talbot county, to the town of Salisbury, in Wicomico county, through Talbot, Caroline, Dorchester and Wicomico counties, granted to the corporation the power to conduct and operate branch roads, to acquire pleasure resorts along its road, and to acquire wharves and steamboats, and by section 2, it was enacted:

"That said corporation shall have perpetual existence, and its franchises, property, shares of capital stock and bonds shall be exempt from all State, county and municipal taxation for the term of thirty years from the date of completion of said road between the termini mentioned in its charter."

Additional sections granted to the Baltimore and Eastern Shore Railroad Company the power to lease or purchase and operate any railroad or railroads either in or out of this State for the purpose of carrying on their business, and any other railroad in this State was granted the right to lease or sell its railroad or other property to the Baltimore and Eastern Shore Railroad Company.

(174) The Baltimore and Eastern Shore Railroad Company in 1890 purchased the Wicomico and Pocomoke Railroad, a road about thirty miles long, extending from Salisbury to Ocean City.

On July 1st, 1890, the Baltimore and Eastern Shore Railroad Company executed a mortgage deed of trust of all its property and all its rights, franchises and privileges, to secure an

issue of bonds, and on July 12, 1902, in compliance with a covenant in the original mortgage, the Baltimore and Eastern Shore Railroad Company executed a supplementary mortgage deed of trust, whereby it conveyed by way of further assurance and security, every right, franchise and immunity and exemption from taxation granted it by the Act of 1886.

This mortgage was foreclosed in 1894, and all the mortgaged property, franchises, privileges, freedoms, immunities and exemptions were sold.

At the time the enlarged corporate powers and immunities were granted to the Baltimore and Eastern Shore Railroad Company by the Act of 1886, and at the date of the execution of the mortgage of 1890 and the supplementary mortgage of 1892, and at the time of the foreclosure of the mortgages and the sale of the property, franchises, immunities and exemptions by virtue of the judicial decree foreclosing the mortgages there was in operation and effect in Maryland sections 187 and 188 of Article 23 of the Code of Maryland, as follows:

"Sec. 187. In case of the sale of any railroad situated
(175) wholly within this State, or partly within this State and partly within an adjoining State, or the District of Columbia, heretofore or hereafter made by virtue of any mortgage or deed of trust, whether under foreclosure or other judicial proceedings, or pursuant to any power contained in said mortgage or deed of trust, the purchaser or purchasers thereof, or his or their survivor or survivors, representatives or assigns, may, together with their associates, if any, form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, or such portions thereof as may be situated within this State, by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors, &c., &c., &c."

"Sec. 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or that part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this State, or the laws of any other State in which any part of such railroad may have been situated, not inconsistent with the laws of this State."

Pursuant to the provisions of the foregoing sections of the Maryland Code the purchaser and his associates duly filed the certificate forming the Baltimore, Chesapeake and Atlantic Railway Company.

(176) The complainant contends that the said Baltimore, Chesapeake and Atlantic Railway Company, his mortgagor, is entitled to hold the property, franchises and immunities, so as aforesaid purchased at the said foreclosuree sale, with the same immunity and freedom from taxation as the same was held by the Baltimore and Eastern Shore Railroad Company under the provisions of the Act of 1886, Chapter 133.

Until the decision of the Court of Appeals of Maryland in 1899, reported in 89 Maryland, page 89, and the decision in 1901, reported in 93 Maryland, page 113, there had been no decision in Maryland construing the effect of the Act of 1886 or the effect of the provisions of the Maryland Code, Art. 23, sections 187 and 188, giving to the purchaser of a railroad in Maryland all the powers, rights, *immunities,* privileges and franchises possessed by the corporation which owned or held such railroad before the sale under or by virtue of its charter, and any amendments thereto, or of other laws of the State, so that the Baltimore, Chesapeake and Atlantic Railway Company acquired whatever rights the foreclosure vested in the purchaser and whatever rights it acquired under section 188 of Article 23 of the Maryland Code without notice of any meaning to be given that legislation other than the natural meaning of the words and the construction put upon them by previous decisions.

In *Chesapeake and Ohio Railroad Company* vs. *Miller,* 114 U. S., 176, it was held by the Supreme Court of the United States that the legislative grant by West Virginia to (177) the Covington and Ohio Railroad Company, that "no taxation upon the property of said company shall be imposed by the State until the profits of the said company shall amount to ten per cent. on the capital stock of said company," imported by its language that the contract was personal to that corporation and intended to benefit those who should subscribe to its stock, and that the property was exempt so long as it was the property of that corporation and no other, and while it continued the property of that company and no longer, the exemption to cease when the profits of that particular company should amount to ten per cent. on the capital stock of that company and not the capital stock of any other company. The Supreme Court further held that the exempting clause contained no words indicating either expressly or by any implication that this immunity was assignable.

In that case, as in the present case, the property had passed from the original corporation under judicial sale, and there was a legislative enactment on the subject, the language of which was that "such sale and conveyance shall pass to the purchaser

at the sale, not only the works and property of the company as they were at the time of making the deed of trust or mortgage, but any works which the company may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of sale, other than debts to it," * * * "upon such conveyance to the purchaser the said company shall, *ipso facto,* be dissolved," "and the said pur-
(178) chaser shall forthwith be a corporation by any name which may be set forth in said conveyance or in any writing signed by them, &c., &c. The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges, and perform all such duties as would have been had or should have been performed by the first company but for such sale and conveyance, &c., &c."

With reference to this enactment the Supreme Court said (page 185): The words used are, it will be observed, "franchises, rights and privileges * * * as would have been had * * * by the first company but for such sale, &c." "There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption. As was said on this point in *Morgan* vs. *Louisiana,* 93 U. S., 217-223: "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and indefinite meaning to the term 'franchises.' It is often used as synonymous with rights, privileges and immunities, though of a personal and temporary character; so that if one of these exists it is loosely termed a franchise, and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is
(179) to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights and privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal and incapable of transfer *without express statutory direction.*"

The opinion then proceeds (page 186): "Here there is no such express statutory direction. Nor is there an equivalent implication by necessary construction. There is nothing in

the language itself, nor the context, nor the subject matter of the legislation, nor the situation and relation of the parties to be effected which indicates that a grant of an exemption from taxation to a particular railroad corporation or to a class of such was in the contemplation of the Legislature."

In *Picard* vs. *East Tennesse, Virginia and Georgia Railroad Company,* 130 U. S., 637, it was also held by the Supreme Court that legislative immunity from taxation is a personal privilege not transferable, and not to be extended beyond (180) the immediate grantee unless otherwise so declared in express terms, and must appear in language so clear and unmistakable as to leave no doubt as to the purpose of the Legislature.

In *Memphis Railroad Company* vs. *Commissioners,* 112 U. S., 609-617, after citing a number of prior decisions to the same effect, the court said: "The exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor."

By these and other cases dealing with the same subject matter is clear that the exemption from taxation granted to the Baltimore and Eastern Shore Railroad Company could not be assigned by it so as to pass a continuing exemption to the purchaser under the foreclosure of the mortgage, and the claim of the purchaser in this case must rest solely upon the language of section 187 and 188 of the Maryland Code. And the question now is whether section 188 does express a clear legislative intent that the purchaser shall obtain as a new corporation that exemption from taxation which the mortgagor company possessed and enjoyed. And this question narrows itself to the force and meaning to be given to the word "immunities" used in section 188.

It is true that no case decided by the Supreme Court has yet passed upon that precise question raised in precisely the (181) same way, but the force and effect of the word "immunities" was carefully considered in *Louisville and Nashville Railroad Company* vs. *Palmes,* 109 U. S., 244 (1883). The Alabama and Florida Railroad Company was entitled by the law of Florida to tax exemption for its capital stock and property. By foreclosure sale the railroad and all the rights, privileges and franchises of that company became vested in the Pensacola and Louisville Railroad Company, and to that company by a special law was granted the same tax exemption as the first company had. By a second foreclosure sale the title of

the second company to the railroad was transferred to a third company, viz., the Pensacola Railroad Company, "*together* with all the franchises, rights, privileges, easements and *immunities*" of the second company, viz., the Pensacola and Louisville Company. By an act of Legislature the third company, viz., the Pensacola Railroad Company, had been empowered to acquire by purchase and assignment all the property, rights, franchises, privileges and immunities of the Pensacola and Louisville Railroad Company, and upon completion of said purchase and assignment the said Pensacola Company was to be deemed in law and equity fully invested with and entitled to all the said property, rights, franchises, privileges and immunities of said Pensacola and Louisville Railroad Company as though the same were originally granted to or acquired by the said Pensacola Railroad.

Commenting on the foregoing language of the Act incorporating the Pensacola Railroad Company and empowering it (182) to acquire by purchase and assignment all the property, rights franchises, privileges and immunities of the Pensacola and Louisville Railroad Company and to be fully invested with them as fully as if originally granted to the Pensacola Railroad Company, the Supreme Court said:

"It is claimed that this language is broad enough to cover the assignment and transfer of the immunity from taxation granted to the Pensacola and Louisville Railroad by the 18th section of its charter. And we are of this opinion. The language is comprehensive and unequivocal, and the word *immunity* is apt to describe the exemption claimed."

The opinion of the Supreme Court, however, then proceeds to dispose of the case on entirely different grounds, but not at all modifying the conclusion above stated.

In *Phoenix Insurance Company* vs. *Tennessee* (1895), 161 U. S., 174, the force and effect of the word *immunity*, in respect to an exemption from taxation, was emphasized. In that case it appeared that the Legislature of Tennessee incorporated the Bluff City Insurance Company and enacted "that said company shall pay to the State an annual tax of one-half of one per cent. on each share of the capital stock subscribed, which shall be in lieu of all other taxes."

Subsequently the Legislature incorporated the De Soto Insurance Company and granted to it "all the rights, privileges and *immunities* of the Bluff City Insurance Company."

Subsequently the Legislature also incorporated the Washington Fire and Marine Insurance Company (its name being (183) afterwards changed to the Phoenix and Marine Insurance Company, the plaintiff), and granted to it all the rights

and privileges (omitting the word *immunities*) which had been theretofore granted to the De Soto Insurance Company.

In passing upon the question whether the insurance company last incorporated by the grant to it of all the rights and privileges of the De Soto Company obtained the immunity from taxation which the De Soto Company enjoyed, the Supreme Court said: "The words 'rights, privileges and immunities,' when used in a statute of the kind under consideration are certainly full and ample for the purpose of granting an exemption from the taxation contained in the first or original statute, and when in granting to still another company certain rights the word *'immunities'* is dropped, its absence would seem and ought to have some special significance. In granting to the De Soto Company 'all the rights, privileges and immunities' of the Bluff City Company all words were used which could be regarded as necessary to carry the exemption from taxation possessed by the Bluff City Company, while in the next following grant, that of the charter of the plaintiff in error, the word *'immunities'* is omitted. Is there any meaning to be attached to that omission? And if so, what? We think some meaning is to be attached to it. The word 'immunity' expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described (184) as an 'immunity' than as a privilege, although it is not be denied that the latter word may some times and under some circumstances include such exemption."

In *Tennessee* vs. *Whitworth* (1885), 117 U. S., 139, it was held that in a grant by the Legislature to a new railroad company of "all the rights, powers and privileges" of an old company which possessed exemption from taxation, that exemption was granted to the new company even without the word *"immunity,"* but the Supreme Court in *Phoenix Insurance Company* vs. *Tennessee*, page 182, points out that this decision should be "confined to the peculiar language used in the various statutes therein cited, wherein, aside from the word 'privilege,' it may be argued that considering all the language used in those statutes, the intention of the Legislature to exempt from taxation may fairly well be made out."

From the foregoing citations I think it must be deduced that when, in addition to the words powers, rights, privileges and franchises, there is added the word "immunities" in granting to a new company the same charter attributes which were enjoyed by an older corporation which possesses exemption from taxation, the word immunities includes immunity from taxation and is the apt word used in the legislation to express that particular exemption.

If exemption from taxation can be granted by any general
(185) words, what could be stronger evidence of that intent than the language of section 188 of Article 23, of the Maryland Code.

"Sec. 188. Such corpuoration" (that is to say the new corporation formed by the purchaser of a railroad at a judicial sale) "shall possess all the powers, rights, *immunities,* privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this State or the laws of any other State in which any part of such railroad may have been situated; not inconsistent with the laws of this State."

If the meaning of the word immunity, when used by the Legislature, includes immunity from taxation, then it is not possible to doubt the meaning of section 188. Its force and effect do not depend at all upon the assignability of an exemption from taxation, and is not affected by the fact that it was an exemption personal to the Baltimore and Eastern Shore Railroad Company, for although it may be spoken of as the continuing of a previous exemption, it is in fact a new legislative grant to a new corporation created to receive it. It is a grant in respect to certain real and personal property pointed out and designated by its having been owned previous to the sale by the original company. It is difficult to conceive what immunity in respect to this property could be meant if not the im-
(186) munity from taxation which the original company had possessed.

It is not, however, an irrevocable grant, but under the Constitution of Maryland may be repealed or modified at the pleasure of the Legislature.

The effect of sections 187 and 188 of the Maryland Code is to say to those asked to loan money to help build a railroad, which the Legislature has thought sufficiently important to the development of the State to grant tax exemption to the corporation chartered to build it, if you loan your money you shall have as an element of value in your security if you are obliged to foreclose and sell the railroad, the same immunities which we have granted to the company which proposes to build the road, subject however, to the right to take away or modify the exemption by a law of the State if any Legislature thinks the welfare of the State requires it.

It seems to me the language fully satisfies the requirement

laid down by the Supreme Court in *Picard* vs. *Tennessee, &c., R. R. Co.,* 130 U. S., page 641, that to justify the conclusion that such exemption is granted it must appear by language so clear and unmistakable as to leave no doubt of the purpose of the Legislature.

I have been constrained, after a painstaking consideration of this case, to the conclusion that under section 188 of Article 23, of the MarylandCode, fairly interpreted in the light of the decisions of the Supreme Court, the Baltimore, Chesapeake and Atlantic Railway Company, in respect to the property pur-
(187) chased under the foreclosure sale, and which was exempt while in the possession of the Baltimore and Eastern Shore Railroad Company, did have granted to it the exemption possessed by the original company, and that the exercising of the taxing power delegated by the State Legislature to the Board of County Commissioners, by imposing a tax on this property, is a legislative act impairing the obligation of the contract of exemption and within the inhibiton of the Federal Consttution.

I have arrived at this conclusion reluctantly, because, while it is the duty of the Federal courts in questions of this nature to exercise their own independent judgment, they should be slow to differ from the State court, and lean towards an agreement with if it the question seems doubtful.

Folsom vs. *Township,* 159 U. S., 611.

Burgess vs. *Seligman,* 107 U. S., 20.

Loch vs. *Seligman,* 179 U. S., 472-473.

It remains to consider what property is within a strict construction of the exemption. By section 188 of Article 23 the immunity is declared to be the same which the original corporation enjoyed in respect to the railroad sold and the real and personal property appertaining to the same.

The three classes of property which were conveyed by the foreclosure sale as stated in complainant's brief are:

"First. Property formerly belonging to the Baltimore
(188) and Eastern Shore Railroad and forming a part of the line built by it under its charter power to construct a road between Eastern Bay and Salisbury.

Second. Property formerly owned by the Baltimore and Eastern Shore Railroad and acquired by it under its purchase of the Wicomico and Pocomoke property.

Third. Property at no time owned by the Baltimore and Eastern Shore Railroad, but acquired by the Baltimore, Chesapeake and Atlantic Railway Company subsequent to its organization. This class consists mainly of steamboats and wharf property."

In *Baltimore, Chesapeake and Atlantic Railway Co.* vs. *Ocean City,* 89 Maryland, page 89, the Court of Appeals of Maryland had before it the question whether the property purchased by the Baltimore and Eastern Shore Railroad Company, known as the Wicomico and Pocomoke Railroad, was within the exemption granted by the Act of 1886, Chapter 133, and the court said (page 97): "The Act of 1886 provided for the building and working of a railroad from the shores of Eastern Bay, in Talbot county, to Salisbury, in Wicomico county, passing through the counties of Talbot, Caroline, Dorchester and Wicomico, and it is quite clear, we think, that it was only such property as is necessary for the operation of this road that the Legislature intended to except from State, county and municipal taxation for the term of thirty years from the date of the completion of the road. It means the railroad and its property mentioned in the act, and none other." (189) This seems a fair construction of the Act of 1886, Chapter 133, considering the great strictness with which tax exemptions are construed.

Therefore only the property of the first class above mentioned is exempt.

I will sign a decree for an injunction in accordance with the views herein expressed.

DECREE.

(190) Filed April 6, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MARYLAND.

Samuel Bancroft, Jr.,
vs.
County Commissioners of Wicomico County.

This cause coming on for final hearing upon the bill, answer and agreed statement of facts, and the same having been read and considered, and the arguments of counsel thereon heard by the court, and the court being of opinion that, under the pleadings and evidence in this case, the camplainant is entitled to the relief prayed in the bill, in regard to a certain part of the property therein mentioned, it is by court this 6th day of April, 1903, ordered, adjudged and decreed that the said defendants be, and they are hereby, enjoined and prohibited from levying, assessing or collecting taxes upon so much of the property of the Baltimore, Chesapeake & Atlantic Railway

Company situate and being in Wicomico county, State of Maryland, as was formerly the property of the Baltimore & Eastern Shore Railroad Company, constructed and built by said road under its charter to construct and build a line of railway between its terminus at Eastern Bay, now called Claiborne, in Talbot county, State of Maryland, and Salisbury, in Wicomico county, in said State, which said property was subsequently sold at foreclosure sale of said Baltimore & Eastern Shore Railroad Company and became through said sale the property of the Baltimore, Chesapeake & Atlantic Railway Company.

And it is further ordered, adjudged and decreed that as to all other property mentioned in the bill of complaint filed in this cause, owned by the said Baltimore, Chesapeake & Atlantic Railway Company, and situate in said Wicomico county, or taxable therein, that the relief prayed by the bill is hereby denied. And it is further ordered that each party pay their own costs.

(191) THOS. J. MORRIS, Judge.

PETITION OF DEFENDANTS FOR AN APPEAL, ASSIGNMENT OF ERRORS AND ORDER OF COURT ALLOWING AN APPEAL.

(192) Filed 18 September, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Samuel Bancroft, Jr.,
vs.
The County Commissioners of Wicomico County, Samuel P. Wilson, J. Ratcliffe Farlow, Elijah J. Adkins, Robert F. Colbourn and Levin B. Weatherly.

In the matter of the petition of the County Commissioners of Wicomico county.

To the Honorable the Judges of the said Court:

The County Commissioners of Wicomico county, corporation duly incorporated by the Legislature of the State of Maryland (the defendants in the matter which is above entitled), and Samuel P. Wilson, J. Ratcliffe Farlow, Elijah J. Adkins, Robert F. Colbourn and Levin B. Weatherly, constituting the

said Board of County Commissioners at the time of the institution of the said suit, being aggrieved at the decretal order, rulings and findings of the Circuit Court of the United States for the District of Maryland in this case and matter, by this, its petition, prays that it may be allowed to appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the decretal order which was passed herein on the sixth day of April, 1903; that a proper citation may be issued and served upon the complainant (the appellee); that a record of the proceedings in this case may be transmitted to the said United States Circuit Court of Appeals; that the said decretal order may be reversed, and that a decretal order may be directed to be passed in favor of your petitioners and in accordance with the answer to the bill of complaint in this cause; and (193) your petitioners further pray that this honorable court prescribe and fix the amount of appeal bond to be given by or for petitioners. Petitioners designate and file herewith the following assignment of errors to the said decree entered by the sir court:

Assignment of Errors.

First. That the said court erred in overruling the defendants' demurrer to the bill of complaint for want of jurisdiction, both as to the person and the subject matter involved, and in deciding that the court had jurisdiction because of diverse citizenship of the parties to the suit, and in not deciding that the proposed taxation by the defendants was not a violation of the obligation of a contract within the inhibition of the provisions of Sec. 10, Art. 1 of the Constitution of the United States.

Second. That the court erred in rendering the final decree, dated the sixth day of April, 1903, granting an injunction restraining the defendants from levying, assessing and collecting taxes against so much of the property of the Baltimore, Chesapeake and Atlantic Railroad Company as formerly belonged to the Baltimore and Eastern Shore Railroad Company and forming a part of the line built by the said Baltimore and Eastern Shore Railroad Company under its charter power to construct a railroad between Eastern Bay and Salisbury.

Third. That the court erred in declaring and decreeing that so much of the property of the Baltimore, Chesapeake and Atlantic Railway Company as formerly belonged to the Baltimore and Eastern Shore Railroad Company and formerly a part of the line, built by the said Baltimore and Eastern Shore Railroad under its charter power to construct a railroad

between Eastern Bay and Salisbury, is exempt from taxation for the purposes of the State of Maryland and for the purposes of Wicomico county of said State.

(194) Fourth. That the court erred in declaring and decreeing that so much of the property of the Baltimore, Chesapeake and Atlantic Railway Company as formerly belonged to the said The Baltimore and Eastern Shore Railroad Company and formerly a part of the line built by the said Baltimore and Eastern Shore Railroad Company under its charter power to construct a railroad between Eastern Bay and Salisbury is exempt from taxation for the purposes of the State of Maryland and for the purposes of Wicomico county of the said State, and in ruling that "under Sec. 188, Art. 23 of the Public General Laws of the State of Maryland, the Baltimore, Chesapeake and Atlantic Railway Company, in respect to the property purchased under the foreclosure sale, and which was exempt while in the possession of the said Baltimore and Eastern Shore Railroad Company, did have granted to it the exemption possessed by the said The Baltimore and Eastern Shore Railroad Company, and in ruling and declaring that "the exercise of the power of taxation delegated by the State Legislature to the Board of County Commissioners is a legislative act, impairing the obligation of the contract of exemption within the inhibition of the Federal Constitution."

Fifth. That the court erred in declaring and ruling that the exemption granted to the Baltimore and Eastern Shore Railroad Company by the Legislature of the State of Maryland by Chapter 133, Acts of 1886, is a contract between the State of Maryland and the said The Baltimore and Eastern Shore Railroad Company.

Sixth. That the court erred in ruling and declaring that the exemption granted to the said The Baltimore and Eastern Shore Railroad Company was not repealed by the General Assessment Law of the State passed in 1896, Chapter 120, Sec. 1, Sub-sec. 1, providing that "all State and county taxes and all municipal taxes shall be levied upon the assessments made in conformity to the provisions of this article and in conformity with all laws relating to revenue and taxes not embraced in this article, and Sub-sec. 2, providing that "the property, real and personal, of each and every railroad company in this State, (195) working its roads by steam power, shall be assessed for county and municipal purposes in the same manner as the property of individuals may be assessed under this Act."

Seventh. That the court erred in ruling and declaring

that the exemption from taxation granted to the Baltimore and Eastern Shore Railroad Company by the Act of 1886, Chapter 133, of the Laws of the State of Maryland, passed by the foreclosure sale under the mortgage given to the Atlantic Trust Company, and that the same exemption became the right, property or privilege of the Baltimore, Chesapeake and Atlantic Railway Company by the construction and application of sections 187 and 188, Article 23 of the Code of Public General Laws of Maryland.

JAS. E. ELLEGOOD,
Solicitor for Petitioner.

Appeal allowed as prayed and appeal bond for costs fixed at two hundred dollars.

THOS. J. MORRIS, Judge.

September 18th, 1903.

DEFENDANTS' APPEAL BOND.

(196) Filed September 29th, 1903.

Know all men by these presents: That we, the County Commissioners of Wicomico county, a corporation duly incorporated in Maryland, as principal, and Jno. W. Jones, James A. Waller, S. G. Truitt, E. J. Adkins, L. B. Weatherly, as sureties, are held and firmly bound unto Samuel Bancroft, Jr., in the full and just sum of two hundred dollars, to be paid to the said Samuel Bancroft, Jr., his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 22nd day of September, in the year of our Lord, one thousand, nine hundred and three.

Whereas, lately at a Circuit Court of the United States for the District of Maryland, in a suit depending in said court between Samuel Bancroft, Jr., complainant, and the County Commissioners of Wicomico County, and Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Colbourn and Levin W. Wetherly, defendants, a decree was rendered against the said defendants, and the said defendants having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Samuel Bancroft, Jr., citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the day in the said citation mentioned.

Now, the condition of the above obligation is such that if

the said defendants shall prosecute their appeal to effect, and (197) answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

In testimony whereof the County Commissioners of Wicomico county have hereto set its seal & the signature of Jno. W. Jones, presdt.

THE COUNTY COMMISSIONERS,
OF WICOMICO COUNTY,

By J. W. JONES, President. [Seal.]
J. W. JONES, [Seal.]
JAMES A WALLER, [Seal.]
SOLOMON G. TRUITT, [Seal.]
E. J. ADKINS, [Seal.]
L. B. WEATHERLY. [Seal.]

Sealed and delivered in presence of

Test:

H. LAIRD TODD.

Approved by

THOS. J. MORRIS, Judge.

CITATION ON BEHALF OF DEFENDANTS.

(198) UNITED STATES OF AMERICA, } *ss.*:

The President of the United States, to Samuel Bancroft, Jr.—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 28th day of October next, pursuant to an appeal from a decree of the Circuit Court of the United States for the District of Maryland, in your favor passed in a cause in said court wherein The County Commissioners of Wicomico County, a corporation created and existing under the laws of the State of Maryland, Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Coulbourn and Levin B. Weatherly, are defendants, and you are complainant, to show cause, if any there be, why the decree rendered against

the said defendants in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas J. Morris, Judge of the said Circuit Court of the United States, this 29th day of September, in the year of our Lord one thousand nine hundred and three.

THOS. J. MORRIS, Judge.

Service of the within citation acknowledge this 30th day of September, 1903.

NICHOLAS P. BOND,
Solicitor for Complainant.

PETITION OF SAMUEL BANCROFT, Jr., COMPLAINANT, FOR AN APPEAL, ASSIGNMENT OF ERRORS AND ORDER OF COURT ALLOWING AN APPEAL.

(199) Filed 19 September, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND FOR THE DISTRICT OF MARYLAND.

Samuel Bancroft, Jr.,
vs
County Commissioners of Wicimico County.

Comes now the complainant, Samuel Bancroft, Jr., and prays an appeal from the final order and decree of this court, filed on the sixth day of April, 1903, to the Circuit Court of Appeals, and alleges that in the said order and decree there is error in this, to-wit:

I. The court erred in decreeing that the provisions of the Act of 1886, Ch. 133, by which immunity from taxation was secured to the Baltimore & Eastern Shore Railroad Company, was not extended to the property formerly constituting the Wicomico & Pocomoke Railroad Company after such property was purchased by and conveyed to the Baltimore & Eastern Shore Railroad Company, in the year 1890.

2. The court erred in decreeing that section 187 and 188 of Article 23 of the Code of Maryland, under the terms of which the immunity from taxation, granted to the Baltimore & Eastern Shore Railroad Company by the Acts of 1886, Ch, 133, was secured to its successor, viz: The Baltimore, Chesapeake &

Atlantic Railway Company, do not extend such immunity to the property formerly constituting the Wicomico & Pocomoke Railroad Company, which had been conveyed to the Baltimore & Eastern Shore Railroad Company in 1890.

3. The court erred in decreeing that a part only of the property, sold under the decree foreclosing the mortgage of the (200) Baltimore & Eastern Shore Railroad Company, and purchased by Nicholas P. Bond, purchaser at said sale, and described in the certificate filed by the said Bond, in pursuance of sections 187 and 188 of Article 23 of the Code of Maryland, was entitled to the immunity from taxation granted to the Baltimore, Chesapeake & Atlantic Railway Company by said sections.

4. The court erred in decreeing that the exemptions which had been granted to the Baltimore & Eastern Shore Railroad Company by Acts of 1886, Chapter 133, and which had been secured under sections 187 and 188 of Article 23 of the Code of Maryland, to its successor, viz: The Baltimore, Chesapeake & Atlantic Railway Company, do not extend to all the property acquired by the said Baltimore, Chesapeake & Atlantic Railway Company, although said property may not at any time have been a part of the said Baltimore & Eastern Shore Railroad Company.

NICHOLAS P. BOND,
Solicitor for Complainant.

Appeal allowed as prayed and appeal bond for costs fixed at two hundred dollars.

THOS. J. MORRIS, Judge.

Sept 19, 1903.

COMPLAINANT'S APPEAL BOND.

(201) Filed 30th September, 1903.

Know all men by these presents: That we, Willard Thompson, of the city of Baltimore, Maryland, as principal, and The United States Fidelity and Guaranty Company, a corporation of Maryland, as surety, are held and firmly bound unto the United States of America, in the full and just sum of two hundred dollars ($200.00), to be paid to the said the United States of America, or its certain attorney or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and

severally, by these presents. Sealed with our seals and dated this thirtieth day of September, in the year of our Lord, one thousand nine hundred and three.

Whereas, lately at a Circuit Court of the United States for the District of Maryland, in a suit depending in said court, between Samuel Bancroft, Jr., plaintiff, and the County Commissioners of Wicomico county, Maryland, et al., defendants, a decree was rendered against the said plaintiff, and the said plaintiff, Sampel Bancroft, Jr., having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said defendants, the County Commissioners of Wicomico county, Maryland, et al., citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the day in the said citation mentioned.

Now, the condition of the above obligation is such, that if the said Samuel Bancroft, Jr., shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain
(202) in full force and virtue.

WILLARD THOMPSON, [Seal.]

THE UNITED STATES FIDELITY
AND GUARANTY COMPANY,
By EDW. J. PENNIMAN,
2nd Vice-President.

[Seal U. S. Fidelity and Casualty Co.]

Attest:

ALBERT H. BUCK,
4th Asst. Secretary.

Sealed and delivered
in presence of

RALPH ROBINSON.

Approved by

THOS. J. MORRIS, Judge.

CITATION ON BEHALF OF COMPLAINANT.

(203) UNITED STATES OF AMERICA—SS.:

The President of the United States, to the County Commissioners of Wicomico county, a corporation created and existing under the laws of the State of Maryland; Samuel P. Wilson, J. Ratcliff Farlow, Elijah J. Adkins, Robert F. Colbourn and Levin B. Wertherly—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond on the 28th day of October next, pursuant to an appeal from a decree of the Circuit Court of the United States for the District of Maryland in your favor passed in a cause in said court, wherein Samuel Bancroft, Jr., is complainant and you are defendants, to show cause, if any there be, why the decree rendered against the said complainant in said cause mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Thomas J. Morris, judge of the said Circuit Court of the United States, this 30th day of September, in the year of our Lord one thousand nine hundred and three.

THOS. J. MORRIS, Judge.

Service of the within citation acknowledged this first day October, 1903.

JAS. E. ELLEGOOD,
Atty. for Co. Comrs. et al., Defts.

STIPULATION AS TO RECORD.

(204) Filed October 12, 1903.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Samuel Bancroft, Jr., Complainant,
vs.
The County Commissioners of Wicomico County, et al., Defendants.

It is stipulated by and between the counsel for the respective parties to the above entitled case, this 12th day of October, 1903, that the clerk of said court, in making up the record on appeal therein to the United States Circuit Court of Appeals

for the Fourth Circuit, shall omit therefrom portions of the printed record of the Court of Appeals of Maryland in the case of The County Commissioners of Wicomico County vs. The Baltimore, Chesapeake and Atlantic Railway Company, which was filed as an exhibit in this case, viz., all of page 7, from and including the words "Agreed Statement of Facts," on the 21st line thereof, to the end of the page, and all on pages 8, 9 and 10; and also that portion of page 15 of said printed record beginning with the words "Plaintiff's bill of exceptions, filed September 20th, 1899, to-wit:" on the 35th line thereof to the end of the page, and pages 16, 17 and 18, and that portion of page 19 from the beginning thereof down to the word "thereupon" on the 19th line thereof.

NICHOLAS P. BOND,
Solicitor for Complainant.
JAS. E. ELLEGOOD,
Solicitor for Defendants.

ORDER TO TRANSMIT RECORD.

(205) And thereupon is it ordered by the court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste:

JAS. W. CHEW, Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Maryland, } to-wit:

I, James W. Chew, clerk of the Circuit Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said Circuit Court, together with all things thereunto relating in the therein entitled cause, made up in accordance with stipulation of counsel filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said Circuit Court this twelfth day of October, 1903.

JAS. W. CHEW, Clerk.

[The Seal of the Circuit, Maryland.]

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 516.

County Commissioners of Wicomico County, Maryland, Samuel P. Wilson et al., Defendants and Appellants, *versus* Samuel Bancroft, Jr., Complainant and Appellee.	Cross-Appeals from the Circuit Court of the United States for the District of Maryland.

Oct. 14, 1903, transcript of the record is filed and the cause docketed.

Same day, appearance of James E. Ellegood for the County Commissioners of Wicomico County et al., and N. P. Bond and Ralph Robinson for Samual Bancroft, Jr., orders filed.

Oct. 23, 1903, twenty copies of the printed record is filed.

Nov. 23, 1903, (November term, 1903), cause came on to be heard and is argued by counsel, and submitted.

ORDER RESTORING CAUSE TO DOCKET FOR RE-AGUMENT

Filed May 4, 1904.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 516.

County Commissioners of Wicomico County, Md., et al., Defendants and Appellants, *vs.* Samuel Bancroft, Jr., Complainant and Appellee.	Cross-Appeals from the Circuit Court of the United States for the District of Maryland.

For reasons appearing to the court, this cause, which was on Nov. 23, 1903, argued and submitted, is restored to the docket for a re-argument therein to be had.

NATHAN GOFF,
May 4th, 1904. Circuit Judge Presiding.

May 11, 1904, (May term, 1904), the cause is continued.

Nov. 18, 1904, (November term, 1904), cause came on be heard and is re-argued by counsel and submitted.

Feb. 21, 1905, (February term, 1905,) the court announced and filed its opinion, which is as follows, to-wit:

OPINION.

Filed Feb. 21, 1905.

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 516.

County Commissioners of Wicomico County, Maryland, Samuel P. Wilson, et al., Appellants,
v.
Samuel Bancroft, Jr., Appellee.

Cross Appeals from the Circuit Court of the United States for the District of Maryland, at Baltimore.

[Argued November 18, 1904. Decided February 21, 1905.]

Before GOFF and PRITCHARD, Circuit Judges, and BRAWLEY, District Judge.

JAS. E. ELLEGOOD, attorney for appellants; N. P. BOND (BOND & ROBINSON on the brief), attorneys for appellee.

PRITCHARD, Circuit Judge:

This is a cross appeal from a decree of the Circuit Court for the District of Maryland, rendered in a cause wherein a certain bondholder of the Baltimore, Chesapeake & Atlantic Railway Company is plaintiff and the County Commissioners of Wicomico County, of the State of Maryland, are defendants.

The suit is brought to restrain the defendants from levying taxes on the mortgaged property represented by the bonds and from enforcing the payment of taxes by a sale of the property. It appears from the admitted facts in the case that the corporation was formed to build a line of railroad from Eastern Bay, in Talbot County, to the town of Salisbury, in Wicomico County. It also appears the corpora-

tion obtained from the legislature of Maryland an act enlarging its powers and granting it certain privileges and immunities. The act in question is chapter 133 of the Laws of Maryland of 1886, and the sections of the act which more particularly relate to the issues in this case are Nos. 2, 4, and 5, which are as follows:

"Sec. 2. And be it enacted, That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all State, county or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the termini mentioned in its charter.

"Sec. 4. And be it enacted, That the said Baltimore & Eastern Shore Railroad Company, aforesaid, shall have power to unite, connect and consolidate with any railroad company or companies, either in or out of this State, so that the capital stock of said companies so united, connected and consolidated (respectively), may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy, under and by virtue of their respective charters.

"Sec. 5. And be it enacted, That the Baltimore & Eastern Shore Railroad Company shall have power to lease or purchase and operate any railroad or railroads, either in or out of the State, for the purpose of carrying on their business, and any other railroad company in this State shall have the right to lease or sell its railroad or other property to the said Baltimore & Eastern Shore Railroad Company."

The Baltimore & Eastern Shore Railroad Company, in compliance with the provisions of the act, proceeded to construct the road between the termini in its charter which it completed in August, 1891, and also in June, 1890, purchased all the property of the Wicomico & Pocomoke Railroad Company, which was duly conveyed to it by deed. The Wicomico and Pocomoke Railroad Company, consisted of a line of road about thirty miles in length, extending from Salisbury to Ocean City, and, with the line

of railroad complete, the Baltimore & Eastern Shore Railroad consisted of a line of road about ninety miles in length, from Eastern Bay to the Atlantic Ocean. After the Baltimore & Eastern Shore Railroad Company had acquired the Wicomico & Pocomoke Railroad it mortgaged the whole of its property to secure an issue of one million, six hundred thousand dollars of mortgage bonds at par value. This mortgage describes the property as follows: "all and singular the entire line of railroad of the party of the first part (The Baltimore & Eastern Shore Railroad, situate, lying and being in the State of Maryland, between Broad Cove, Eassern Bay, Talbot County, and Salisbury, in Worcester (*sic*) County), and extending from said termini through the counties of Talbot, Caroline, Dorcester and Wicomico, in said State, and also all the line of railroad from Salisbury, Wicomico County, and Hammock Point, in Worcester County, in said State, which said last mentioned railroad comprised the railroad of Wicomoco & Pocomoke Railroad Company, an entire distance of about ninety miles," and also steamboats, docks, piers, rolling stock, etc.; and the rights, privileges, franchises, and immunities, and exemptions, including the "immunity and exemption from taxation granted to, conferred and bestowed on the party of the first part." This mortgage was foreclosed in 1894, by a decree of the Circuit Court for the District of Maryland, and the purchaser of the said mortgaged property at the sale thereof, organized a corporation under the name of the Baltimore, Chesapeake & Atlantic Railway Company, under the provisions of sections 187, 188, of Article 23, of the Code of Maryland, which provisions are as follows:

"Sec. 187. In case of the sale of any railroad situated wholly within this State, or partly within this State and partly within an adjoining State, or the District of Columbia, heretofore or hereafter made by virtue of any mortgage or deed of trust, whether under foreclosure or other judicial proceedings, or pursuant to any power contained in said mortgage or deed of trust, the purchaser or purchasers thereof, or his or their survivor or survivors, representatives or assigns, may, together with their associates, if any, form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, or such portions thereof, as may be situated within this State, by filing in the

office of the secretary of State a certificate of the name and style of such corporation, the number of directors, &c., &c.

"Sec. 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or that part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto, and of other laws of this State, or the laws of any other State in which any part of such railroad may have been situated, not inconsistent with the laws of this State."

Pursuant to the foregoing provisions of the Code of Maryland, the purchaser and his associates duly filed a certificate forming the Baltimore, Chesapeake & Atlantic Railway Company. The complainant contends that the Baltimore, Chesapeake & Atlantic Railway Company, as mortgagor, is entitled to all the property, franchises and immunities purchased as aforesaid, at foreclosure sale with the same immunity and freedom from taxation as the same was held by the Baltimore & Eastern Shore Railroad Company, under the provisions of the act of 1886, chap. 123.

In determining the question of jurisdiction the court held that diverse citizenship gave it jurisdiction and in passing upon the preliminary questions the learned judge said: "The questions with regard to the jurisdiction of this court were heretofore considered on a demurrer and it was held that the diverse citizenship gave the court jurisdiction; that the allegation that the trustee under the mortgage was a non-resident of the State of Maryland and refused to proceed in this behalf except on conditions with which the complainant was unable to comply were sufficient to give complainant a standing to file his bill. It was further held complainant claiming under the mortgage, was not bound by the judgment against the railway company to which no one claiming under the mortgage was a party, and the complainant was therefore not estopped as by *res adjudicata*."

This ruling of the court is sustained by a number of decisions. A mortgagee is not bound by any proceedings

against his mortgagor which were instituted subsequent to the execution of the mortgage unless he was a party thereto.

Keokuk & W. R. R. v. *Missouri*, 151 U. S., 301;
Campbell v. *Hall*, 16 N. Y., 575;
Carroll v. *Goldschmidt*, 83 F. R., 510:

While it is true that certain suits were instituted in the court of Maryland, one of which was between the Baltimore, Chesapeake & Atlantic Railway Company, mortgagor, and against the mayor and city council of Ocean City; the other between the mayor and plaintiff, but complainant was not a party to either of these suits.

Complainant is the holder of twenty bonds of the face value of one thousand dollars each secured by a mortgage made by the Baltimore, Chesapeake & Atlantic Railway Company, to the Atlantic Trust Company, of New York, long prior to the institution and final adjudication of the cases in the courts of Maryland. The interest of complainant, therefore, is of such a character as to entitle him in a court of equity to seek the relief to which he claims to be entitled under the allegations contained in the bill.

The Balt. Trust & G. Company v. *Balt.*, 64 F. R., 153;
Barnes v. *Koenegy*, 62 F. R., 671;
Merchantile T. & Dep. Co. v. *Tex. Ry.*, 51 F. R., 529:

We now come to consider the question as to whether complainant is entitled to the relief sought in the bill, and in order to determine this question, it is necessary to consider the provisions of sections 187 and 188 of article 23, of the Code of Maryland.

It was clearly the intention of the legislature to provide means by which corporations that became insolvent or otherwise embarrassed could be reorganized and continued under the provisions of the charter which originally brought them into existence. These sections were evidently framed for the purpose of providing for emergencies like the one presented in this case. There is a general inclination on the part of State legislatures to grant immunities to railroads and other corporations with the view of encouraging the development of the particular section of country through which they are to be constructed. To undertake to build a short line of railroad in most sections of the country is a precarious one to say the least of it and in the absence of

aid by subscription or immunity from taxation, instances are very rare, where individuals are willing to embark in such hazarduous enterprises. In the present case the legislature of Maryland seemed to adopt this policy and in order to secure the construction of a road granted certain privileges, franchises and immunities to the Baltimore & Eastern Railroad Company for a period of thirty years, but it seems with all the encouragement and aid which had been given this company it was unable to stem the tide and as a result its property was sold under foreclosure and was purchased by the Baltimore, Chesapeake & Atlantic Railway Company.

That the legislature had the power to exempt from taxation the Baltimore & Eastern Shore Railroad Company at the time it was incorporated is unquestioned, and such being the case, it clearly had the right to provide by statute, as it did in this instance, the means by which the exemption from taxation granted to the Baltimore & Eastern Shore Railroad Company should be extended to any company which might undertake to rehabilitate such original corporation, in the event of its becoming insolvent.

Did the sale of the property of the Baltimore & Eastern Shore Railroad Company, under the decree which directed the foreclosure of the mortgage and which undertook to pass the rights, privileges and franchises granted to said company, have the effect of exempting from taxation the property thus acquired by the purchaser at such sale?

In the case of the *Chesapeake & Ohio R. R. Co.* v. *Miller*, 114 U. S., 185, the court held the original company was exempt from taxation. In that case there was a sale, as in this instance, of all the property, rights and franchises of the road and there was also a legislative enactment which provided that the new company should succeed to such franchises, rights and privileges as would have been passed by the first company but for such sale. The Supreme Court in discussing this question said: "There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption. As was said, on this point, in *Morgan* v. *Louisiana*, 93 U. S., 217, 223: "Much confusion of thought had arisen in this case and in similar cases from attaching a vague and undefined meaning to the term 'franchises.'

It is often used as synonomous with rights, privileges and immunities, though of a personal and temporary character; so that, if any of these exist, it is loosely termed 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privilege which are essential to the operations of the corporation, and without which its road, and works would be of little value; such as the franchises to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines and the like. They are positive rights or privileges without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as a part of the property of the company, the latter is personal and is incapable of transfer without express statutory directions."

Here there is no such express statutory direction. Nor is there an equivalent implication by necessary construction. There is nothing in the language itself, nor in the context, nor the subject matter of the legislation, nor the situation in relation of the parties to be affected which indicates that a grant of an exemption from taxation to a particular railroad corporation, or to a class of such, was in the contemplation of the legislature.

In *Memphis R. R. Co.* v. *Commrs.*, 112 U. S., 609–617, after citing a number of decisions to the same effect, the court said:

"According to the principles of those decisions, the exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor."

In view of the authorities bearing on this question, it is clear that the exemption from taxation granted to the Baltimore & Eastern Shore Railroad Company, by its charter, was not assignable, and that a sale of its property did not under such charter carry with it an exemption from taxation. We are, therefore, called upon to decide as to whether the word "immunities" in section 188 is suffi-

cient in its nature to exempt the new company from taxation. There are a number of cases wherein companies have been organized and the courts have been asked to decide whether the legislative grant authorizing the transfer of rights, privileges and franchises to the company thus organized had the effect of exempting such corporations from taxation, but the courts have in most instances held that the use of these terms did not give the new companies exemption from taxation.

In the case of *Phœnix Ins. Co.* v. *Tenn.*, 161 U. S., 174, it was held that where the word "immunity" was omitted in the last legislative grant, that the words, rights and privileges did not exempt the company from taxation. In that case the court said:

"The word 'immunity' expresses more clearly and definitely an intention to include therein an exemption from taxation than does either of the other words. Exemption from taxation is more accurately described as an 'immunity' than as a privilege, although it is not to be denied that the latter word may sometimes and under some circumstances include such exemption."

In passing upon this question it is necessary to ascertain the legislative intent as contained in section 188, and an examination of that section leads us to the conclusion that the legislature fully understood the force and effect of the different terms used therein.

In construing section 188 as affecting the rights of the Baltimore, Chesapeake & Atlantic Railway Company which was organized under its provisions, we are of opinion that the word "immunities" was placed in said section for the purpose of exempting from taxation any and all companies thus reorganized which had been granted exemption from taxation by the legislature in the first instance.

In view of the decisions we are forced to the conclusion that the word "immunities" is an apt expression in the present instance and must be construed to mean exemption from taxation.

The court, in dealing with this question, was not bound to follow the rule of construction adopted by the State court, inasmuch as the organization of the Baltimore, Chesapeake & Atlantic Railway had been consummated, and its bondholders had entered into a contract

with the State of Maryland by which it was agreed that, in consideration of the construction of said road, said company was to be exempt from taxation for a period of thirty years from the date of the completion of the same; and all rights of the bondholders had accrued prior to to the rendition of the decisions of the court of Maryland, and in view of the fact that the purchasers had formed the Baltimore, Chesapeake & Atlantic Railway Company under the provisions of sections 187 and 188 of Art. 23 of the Code of Maryland, and the bonds of complainant had been issued and secured by the mortgage dated September first, anterior to the decisions of the Court of Appeals of Maryland.

The Supreme Court of the United States in the case of *Burgess* v. *Seligman*, 107 U. S., pg. 33, said:

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with, and not subordinate to, that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws, The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case,

although a different interpretation may be adopted by the State courts after such rights have accrued."

The charter granted by the State of Maryland, amendments thereto and section 188, of the Code of that State, constitute a contract between the State and the railroad company by which among other things, 'immunity' from taxation is offered as a consideration or inducement to secure the construction of the railroad between the points mentioned in the charter, and as such, becomes a part of the contract between the State and the railroad company; and the bondholders by virtue of their interest in the original corporation are entitled to this exemption.

The demand on the part of the County Commissioners of Wicomico County is in the nature of a legislative act and is therefore in violation of Art. 1, Clause 10 of the Constitution of the United States, which provides, "No State shall pass any law impairing the obligation of contracts."

We think that the legislature, by the enactment of section 188, intended that such property as was necessary for the operation of the original railroad should be exempt from taxation as enjoyed by that company at the time of the completion of the road.

The three classes of property conveyed by the foreclosure sale, as set forth in complainant's brief, are as follows:

"'A.' Properly formerly belonging to the Baltimore & Eastern Shore Railroad and forming a part of the line built by it under its charter power to construct a road between Eastern Bay and Salisbury.

"'B.' Property formerly owned by the Baltimore & Eastern Shore Railroad and acquired by it under its purchase of the Wicomico & Pocomoke property.

"'C.' Property at no time owned by the Baltimore & Eastern Shore Railroad, but acquired by the Baltimore, Chesapeake & Atlantic Railway Company subsequent to its organization. This class consists mainly of steamboats and wharf property."

In considering this subject in the case of *Baltimore, Chesapeake and Atlantic Railway Co.* v. *Ocean City*, 89 Md., 89, 97, the court among other things, said:

"The act of 1886, provided for the building and working of a railroad from the shores of Eastern Bay, in Talbot County, to Salisbury, in Wicomico County, passing through the counties of Talbot, Caroline, Dorcester and Wicomico, and it is quite clear, we think, that it was only such property as is necessary for the operation of this road that the legislature intended to exempt from State, county and municipal taxation for the term of thirty years from the date of the completion of the road. It means the railroad and its property mentioned in the act, and none other."

We are, therefore, of opinion that only such property as is mentioned in class "A" is entitled to exemption from taxation under the provisions of Section 188.

After carefully considering the authorities bearing on the several questions raised, we are of opinion, for the reasons stated, that there is no error.

Therefore, the judgment of the Circuit Court is

Affirmed.

Feb. 25, 1905, same term), the court made and entered the following decree, to-wit:

DECREE.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 516.

County Commissioners of Wicomico County, Maryland, Samuel P. Wilson et al., Appellants,
vs.
Samuel Bancroft, Jr., Appellee.

Appeal from the Circuit Court of the United States for the District of Maryland.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed, by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby affirmed, with costs.

J. C. PRITCHARD.

February 25th, 1905.

And on another day, to-wit: March 18, 1905, the mandate of this court is issued and transmitted to the said Circuit Court of the United States for the District of Maryland, at Baltimore, in due form.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA, Fourth Circuit, } *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

Seal of the Court.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, this 2nd day of October, A. D., 1905.

HENRY T. MELONEY, Clerk
of U. S. Circuit Court of
Appeals Fourth Circuit.

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 23rd day of January 1906, by annexing hereto a certified copy of the agreement of counsel of record, that the certified transcript of record now on file in the above entitled cause in the Supreme Court of the United States may be taken as a return to the said writ of certiorari.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 30th day of January, A. D., 1906.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA:

In the United States Circuit Court of Appeals for the Fourth Circuit.

COUNTY COMMISSIONERS OF WICOMICO COUNTY, MARYLAND,
vs.
SAMUEL BANCROFT, JR.

Agreement of Counsel.

Whereas the Supreme Court of the United States has issued a Writ of Certiorari to the U. S. Circuit Court of Appeals for the Fourth Circuit, commanding that the said Court send to the Supreme Court aforesaid, the record and proceedings in the above entitled cause, it is hereby agreed and stipulated between the parties aforesaid that the certified transcript of record now on file in the above entitled cause, in the Supreme Court of the United States may be taken as a return to the said writ as fully and to all intents and purposes as though the cause and the records and proceedings in the United States Circuit Court of Appeals for the Fourth Circuit were duly certified and returned in obedience to the command of the said writ.

And the Clerk of the Circuit Court of Appeals aforesaid is hereby requested to send a certified copy of this stipulation to the Supreme Court of the United States, as his return to the said writ.

JAS. E. ELLEGOOD,
Counsel for the Petitioner, Respondent Below.
NICHOLAS P. BOND,
Counsel for Samuel Bancroft, Jr., Complainant Below.

UNITED STATES OF AMERICA, *ss:*

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing agreement of counsel is a true copy of the original filed January 30th, 1906, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereunto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 30th day of January, A. D. 1906.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which The County Commissioners of Wicomico County *et al.*, are appellants, and Samuel Bancroft, Jr., is appellee, and Samuel Bancroft, Jr., is appellant, and the County Commissioners of Wicomico County *et al.*, are appellees, on appeal and cross-appeal, which suit was removed into the said Circuit Court of Appeals by virtue of appeals from the Circuit Court of the United States for the District of Maryland, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 23d day of January, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 19,926. Supreme Court of the United States. No. 424, October Term, 1905. The County Commissioners of Wicomico County *vs.* Samuel Bancroft, Jr. Writ of Certiorari. The Execution of the within writ appears from the schedules thereunto annexed. Henry T. Meloney, Clk. U. S. Cir. Court of Appeals.

[Endorsed:] File No. 19,926. Supreme Court U. S. October Term, 1906. Term No. 129. The County Commissioners of Wicomico County *vs.* Samuel Bancroft, Jr. Writ of Certiorari and return. Filed Jan'y 31", 1906.

FILE COPY.

No. [redacted] O. T. 1905

Supreme Court of the United States

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
OCT 7 1905
JAMES H. McKENNEY,
Clerk

129

THE COUNTY COMMISSIONERS OF WICOMICO COUNTY,
Petitioners,

vs.

SAMUEL BANCROFT, JR.

PETITION FOR WRIT OF CERTIORARI.

JAMES E. ELLEGOOD,
Attorney for Petitioners.

Brewington Brothers Co., 103 Main St., Salisbury, Md.

Supreme Court of the United States.

OCTOBER TERM, 1905.

The County Commissioners of Wicomico County

vs.

Samuel Bancroft, Jr.

NOTICE OF PETITION.

To SAMUEL BANCROFT, JR.,

Please take notice that on the day of 1905, at the opening of the Court on that day, or as soon after as counsel can be heard, a petition of Certiorari will be submitted to the Supreme Court of the United States at the City of Washington, D. C., for the decision of the Court thereon.

In support of said petition a brief will also be presented to the Court.

A copy of the petition and the brief are herewith served upon you.

Respectfully,

.....

Atty. and Counsel for Petitioner.

.....1905.

Due service of the aforegoing notice of motion in the above cause is hereby admitted this day of 1905, as sufficient.

.....

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

The Petitioner, the County Commissioners of Wicomico County, respectfully petitions this Honorable Court to issue a writ of Certiorari, directed to the United States Circuit Court of Appeals for the Fourth Judicial Circuit, requiring that Court to certify to this Honorable Supreme Court the case of Samuel Bancroft, Jr., Complainant, vs. The County Commissioners of Wicomico County; and in support of said petition, the respondent therein, the petitioner herein, respectfully presents the following as grounds in support thereof:

First. That Wicomico County is one of the Organic Political Divisions of the State of Maryland as provided by the Constitution of the said State, and by Sec. 1, Art. 7 of the said Constitution, they are required to be elected on the general ticket of each County by the qualified voters thereof, "and their powers and duties shall be such as are now, or may hereafter be, prescribed by law."

Second. That by Art. 25 of the Code of Public General Laws of the State of Maryland, they are invested with large and responsible public powers and duties relating to the general welfare of the County and the State at large.

Third. That among the powers conferred by the said Articles of the said Code is the duty to levy all needful taxes on the assessable property within the County, liable to taxation and provide for collecting the same, and to pay and discharge all claims on or against the County which have been expressly or impliedly authorized by law. (See Sec. 7, Art. 25 of Code.)

Fourth. That under and by virtue of Art 81, Sec. 10, of said Code of Public General Laws it is made the duty of the said County Commissioners "to assess all assessable property and add the same to the amount on which taxes are to be levied;" and by Sec. 13 of Art. 81 aforesaid, the said Commissioners "are directed to alter and correct the account of any person who may have disposed of their property or acquired any property since the last assessment, or whose property, or any part thereof, may have been omitted, upon satisfactory evidence, and may correct and alter the assessment so as to conform to its true value."

Fifth. By an act of the General Assembly of Maryland passed at the Session of 1896, Chap. 120, of the Laws of Maryland, provision was made for a General Assessment of the property in the said State of Maryland, liable to assessment, and the County Commissioners were constituted a Board of Control and Review for all property assessed in the said County, with power to hear appeals relating to the valuation for assessments, and to correct the same and assess property which had been omitted to be valued by the assessors of the said County, and to examine carefully the reports of valuation of property made by the said assessors and claimed by the owners thereof to be exempt from valuation and assessment, and to correct the same, and "to value any property which had been omitted to be valued by the assessors;" all of which will more fully appear by Sec. 182 of the said Act of 1896, Chapter 120.

Sixth. In Sec. 184 of the said Act of 1896, it is provided that the *owner of property claiming the same to be exempt from valuation and assessment may file a petition in the Circuit Court* for that County in which the said property has been so valued, setting forth the facts of the said case and the ground upon which said exemption is claimed. To which petition the County Commissioners of the County in which the said valuation was made shall be made defendants and are required to answer the said petition. It is also made the duty of the said Circuit Court to hear the case upon petition and answer, affidavit and another satisfactory proof. And the *said Court shall determine whether the said property is or is not subject to such valuation and assessment*, and if the Court shall determine that the said property is subject to such valuation and assessment, it shall so determine by its order.

Seventh. By Sec. 186 of said Act of 1896 it is provided that *any one of the parties* to the proceedings mentioned aforesaid *may appeal from the order of the Court to the Court of Appeals of Maryland.* Said Court shall, if then in session, immediately hear and determine the said case, or shall hear and determine the same upon its re-assembling.

Eighth. That on or about the 27th day of February, 1886, the Baltimore and Eastern Shore Railroad Co. was duly incorporated under provision of the Act of the General Assembly of Maryland, passed in 1876 entitled "an Act to Provide for the Creation and Regulation of Incor-

porated Companies in the State of Maryland," for the purpose of building a Railroad between Claiborne on the Eastern Bay in Talbot County, running through the counties of Talbot, Caroline and Dorchester, with its eastern terminus at Salisbury, Wicomico County, all in the State of Maryland. That afterwards the General Assembly of Maryland, at the session of 1886, being Chap. 133 of the Laws of Maryland greatly enlarged the powers and privileges of the said Baltimore and Eastern Shore Railroad; a summary of which is: to construct and operate branch roads, establish pleasure resorts along the line of the road, to purchase and charter and hold steamboats and barges to ply in connection with their roads, and to unite, connect with and consolidate with any Railroad Company or Companies either in or out of the State, with all property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters. Also with power to lease, purchase or operate any Railroad or Railroads either in or out of this State and conferring upon other Railroads in the State the right to lease or sell its property to the said Baltimore and Eastern Shore Railroad Company, and by Sec. 2 of Chap. 133 of the said Act of 1886, it was provided as follows: "that the said Corporation shall have perpetual existance, and its franchises, property, shares of capital stock and bonds shall be exempt from all State, County or Municipal taxation for the term of 30 years, computing from the date of the completion of the said road between the terminii mentioned in its charter." (See Agreed Statement of Facts, 1st Paragraph, page 27 of Record.

Ninth. That in pursuance of the powers granted the said Railroad Co., it proceeded to construct its road from Claiborne to Salisbury and completed the same about August 1891; and in further pursuance of its powers, it bought the property, assets, rights and franchises of the *Wicomico and Pocomoke Railroad Company*, a corporation of the State of Maryland, which was then, and had been for quite a number of years, operating a railroad between the town of Salisbury, Wicomico County, and Ocean City, Worcester County, Maryland on the Atlantic Coast, thereby completing a continuous line from Claiborne on the Chesapeake Bay, across the Maryland peninsula with its eastern terminus at Ocean City on the Atlantic Coast. (The Wicomico and Pocomoke Railroad Co. had no exemption from taxation for its property and franchises.)

Tenth. That after its incorporation as aforesaid and purchase of the said Wicomico and Pocomoke Railroad Co., the said Baltimore and

Eastern Shore Railroad Co. executed and delivered to the Atlantic Trust Co. a mortgage deed of trust in 1890, and another in 1892 to secure the payment of bonds amounting to $1,600,000. (See Paragraphs 3 and 4 of the Agreed Statement of Facts, p. 28-29 of record.)

Eleventh. That in August 1894 the said mortgage was foreclosed by a decree of the Circuit Court of the United States for the District of Maryland, at the suit of the Scranton Steel Co. and Atlantic Trust Co., against the said Railroad Company; and Nicholas P. Bond became the purchaser thereof. (5th Paragraph, p. 29 of record.)

Twelfth. That the said Bond, together with certain associates, formed a Corporation known as the Baltimore, Chesapeake and Atlantic Railway Company for the purpose of operating, possessing and maintaining the property so acquired. That the said Corporation was organized by virtue of Sections 187-188, et seq., Art. 23 of the Code of Public Gen. Laws, (Par. 6, p. 29 of Record.)

Thirteenth. That afterwards in the month of September, 1894, the said Baltimore, Chesapeake and Atlantic Railway Co. executed a mortgage to the Atlantic Trust Co. to secure 1250 bonds of $1,000 each, and that Samuel Bancroft, Jr., the respondent, (Complainant below) became the owner of certain of the bonds. (See 8th and 9th Paragraphs, p. 30 of Record.

Fourteenth. That after the acquisition of the property and franchises of the Baltimore and Eastern Shore Railroad Company and the Wicomico and Pocomoke Railroad Company by the Baltimore, Chesapeake and Atlantic Railway Company, it purchased large and valuable properties of other Corporations within the State of Maryland, that is to say: The Maryland Steamboat Company, The Eastern Shore Steamboat Company and others, and among them a large number of steamboats plying upon the Chesapeake Bay, making three classes of property owned by the Baltimore, Chesapeake and Atlantic Railway Company, to wit: (1) That originally owned by the Baltimore and Eastern Shore Railroad from Clairne to Salisbury, (2) That owned by the Wicomico and Pocomoke Railroad Company from Salisbury to Ocean City, and (3) that acquired by the Baltimore, Chesapeake and Atlantic Railway Co., after its incorporation. (See p. 32, 33 and 34 of Record.)

Fifteenth. That an assessment was made under the provision of the Act of 1896, Chap. 120 aforesaid, whereby a general assessment of the

property was required to be made, and by which the property "real a personal of each and every Railroad Company in this State, working road by steam power, shall be valued and assessed for County and Mu cipal purposes in the same manner as the property of individuals may valued and assessed under this Act." (See Sec. 2, Chap. 120 of the A of 1896). Section 1 of the said Act requires "all State and County taxes all municipal taxes shall be levid upon the assessments made in confo ity with the provisions of this Article and in conformity with all l relating to revenues and taxes not embraced in this article." But so i that the said Baltimore, Chesapeake and Atlantic Railway Compa claimed that by virtue of the purchase by N. P. Bond of the property franchises formerly belonging to the said Baltimore and Eastern Sh Railway Co., and by virtue of the organization of the said Baltim Chesapeake and Atlantic Railway Company by the said N. P. Bond his associates, under Sec. 187, 188, 189 et sec. Art. 23, of the Code of Public General Laws of the State of Maryland, and because of the exe tions granted to the said Baltimore and Eastern Shore Railroad by Acts of 1886 Chap. 133 as aforsaid, it became entitled to exemption f taxation upon all of its property hereinbefore classified and fully set on pages 32, 33, and 34 of the Record, except wharf property situat Wicomico County, on page 34 of the Record; and all of the said prop (except the said wharf property) was omitted from the assessment bo of the said county, and no levy was made upon the same until 1899.

Sixteenth. That in 1899 the Board of County Commissioners of said County give notice to the said Railroad Company, according to statute in such case made and provided, of the intention of the said C missioners to value and assess the said property in accordance with provisions of the Act of 1896. That the said Company appeared by duly authorized agent and attorney before the said Commissioners claimed exemption from taxation; but the said Commissioners asse the said property at the valuation agreed upon and placed the same u the list of taxable property of the said County and levied taxes ther but the said Railroad Company still refused to pay the said taxes or part thereof; whereupon the said Commissioners brought suit in Circuit Court for Wicomico County and recovered judgment for the 1899 upon the 25th day of September, 1900, upon *all property of the Company*, from which judgment the said Company took an appeal to Court of Appeals of Maryland, which was tried at January Term,

thereof, and the said judgment was affirmed by the said Court of Appeals and is found reported in 93. Md. pg. 113, et seq., of the Reports of the said Court of Appeals.

Seventeenth. That at a prior session of the Court of Appeals, upon the appeal of the said Baltimore, Chesapeake and Atlantic Railway Co. against Ocean City, the said Court had decided that all the said property was liable to taxation, as will be found by reference to page 89, Vol. 89, Md. Reports.

Eighteenth. That the said County Commissioners had, in pursuance of the said decision and in discharge of the duties required of them, levied in June for the year 1900 and 1901 the taxes upon the property of the Baltimore, Chesapeake and Atlantic Railway Co., and placed them in the hands of their duly appointed Collector of Taxes for the said County, whose duty it was to collect the same if necessary by the summary proceedings of distress. (See Code, Art.49-50, Sec. 81). That the only remaining power or duty of the said petitioners was to bring suit for the collection of the taxes, and could only enforce their payment by an execution issued to the Sheriff of said county by the Circuit Court of the said county.

Nineteenth. But notwithstanding the said taxes had been assessed and levied as stated and were in the hands of the said Collector, the respondent herein, (Complainant below) filed the bill of complaint on the second day of August, 1901, in the Circuit Court of the United States in and for the District of Maryland, wherein he alleges "this complainant is informed and believes, and therefore avers, that the said defendants claiming to act as the County Commissioners of Wicomico County, have levied and assessed, and are about to attempt to collect taxes against the said property for the year 1900 and also for the year 1901, and that other counties or towns in which the line of Railway and property of the said Baltimore, Chesapeake and Atlantic Railway passes, or in which it is situated, are about to assess, levy and to attempt to collect taxes not only from the said line of Railway and property purchased from said Wicomico and Pocomoke Railroad, but also against the Railroad and property originally owned by the said Baltimore and Eastern Shore Railroad Co., on the ground that under the said decision of the Court of Appeals of Maryland, the said exemption from taxation did not pass to the said Baltimore, Chesapeake and Atlantic Railway Co., by virtue of the said sale under the decree and order of this Honorable Court in the proceedings of the Atlantic Trust Co. against the Baltimore and Eastern Shore Railroad, and the

said proceedings for the re-organization and formation of the said Railway Co., under Sections 187-88-89-90 of Art. 23 aforesaid". (See XVI, pgh. pg. 1 of Record.) That the said Complainant, (respondent herein) claimed and averred that the Chap. 133 of the Acts of 1896 and the construction o its roads as aforesaid, became by virtue of the said Act aforesaid, a con tract between the State of Maryland and the said Baltimore and Easter Shore Railroad Co., *and its successors, and that any law or ordinance passe by the State of Maryland, or by any municipal corporation or any Count of the said State, impaired the obligation of the said contract and is unlawfu and void* because in violation of the 10th Sec. of Art. 1 of the Constitu tion of the United States forbidding the passage of any law impairing th obligation of contracts and that the said proposed assessment, levy and collection of the said taxes by the defendant against the said Baltimore Chesapeake and Atlantic Railway Co., and the ordinance and resolution passed by the said defendant in which the said taxes are attempted to b enforced, is null and void, because the same impairs the obligation of th contract in Chap. 133 of the Acts of 1886. (See Paragraph XVII, Record p. 10.)

Twentieth. The said Complainant (Respondent herein) prayed fo an injunction from the said Court to restrain the said County Commis sioners forever from assessing, levying, or collecting taxes in any manne against the property of the said Railroad Company, (See prayers for relie p.12 of Record); basing his claim to interfere and ask for this summary relie *upon the meagre and insufficient allegations of paragraphs XVIII and XIX 11 of the Bill of Complaint*, which is, in substance, that he apprehends "a lessening of the ability of the said Railroad Company to pay the interes upon the said bonds"; and because "the amount of taxes will greatly in crease the charges to be paid by the said Railway Company"; and the fur ther allegation that the Atlantic Trust Company refuses to sue, "unles requested by a majority of the said bondholders", and because neither h or any of the bondholders, or the Atlantic Trust Company, were partie to the suit of the Mayor, &c. Ocean City vs. Baltimore, Chesapeake and Atlantic Railway Co., and is not bound by the said decision; paragraph XX, p. 12 of Record. (No reference is made to the decision in the cas between these defendants, petitioners herein, and the B., C. & A. Ry. Co. reported in *93. Md., 113, in which the Act of Assembly referred to, had bee construed by the Court of Appeals of Maryland in favor of the respondent be low, before this injunction suit, and the liability of the said Railway Company*

for taxation had been fixed, and the duty of the said County Commissioners had been settled by the highest Court of Maryland.

Twenty-first. To this Bill of Complaint, this petitioner filed its demurrer, assigning as cause for demurrer:

1. That the plaintiff has not in his bill of complaint, stated any cause entitling him to the relief prayed.

2. Because he has no legal standing in Court upon the allegations of his bill, and for want of jurisdiction in the Court.

And for other good causes appearing on the face of the said bill.

Twenty-second. This demurrer His Honor, Judge Morris, of the District Court of Maryland, "overruled without passing on the merits of the bill", (Record p. 17-18) whereupon the defendant answered the bill of complaint, (see Record p. 19 to 25) which was submitted to the court upon "Agreed Statement of Facts", (Record p. 26 to 34) many of which have been herein set out.

Twenty-third. After the hearing, the learned Judge gave judgment, filed April 6th, 1903, (Record p. 123) wherein it was "adjudged, ordered, and decreed that the said defendant (petitioner herein) be and they are enjoined and prohibited from levying, assessing or collecting taxes upon so much of the property of the Baltimore, Chesapeake & Atlantic Railway Company situate and being in Wicomico county, State of Maryland, as was formerly the property of the Baltimore & Eastern Shore Railroad Company constructed and built by the said Baltimore & Eastern Shore Railroad Co. under its charter", etc., (See p. 124 Record) which decree is founded upon the opinion of the Court, that "under Sec. 188, Art. 23 of the Maryland Code the Baltimore, Chesapeake & Atlantic Railway Company in respect to the property purchased under the foreclosure sale, and which was exempt while in the possession of the Baltimore & Eastern Shore Railroad Company did have granted to it the exemption possessed by the original company, and that *the exercising of the taxing power delegated by the State Legislature to the Board of County Commissioners by imposing a tax on this property is a legislative act impairing the obligation of the contract of exemption and within the inhibition of the Federal Constitution*". (Record p. 122.

Twenty-fourth. From this decree, cross appeals were taken to the United States Circuit Court of Appeals for the Fourth Circuit, which "affirmed" the judgment of the District Court, holding that the "*demand*

on the part of the County Commissioners *is a legislative act* and in viol tion of Art. 1, Sec. 1, of the Constitution of the United States".

We respectfully request the attention of the Court to the opinion the learned Circuit Court of Appeals (Record, page), wherein th Court apparently falls into important errors of fact, when it says "t charter granted by the State of Maryland, and amendments thereto, a Sec. 188 of the Code of that State, constitute a contract between the Sta and the railroad company by which among other things immunity fro taxation is offered as a *consideration* or inducement to secure the construc ion of the railroad between the points mentioned in the char'er, and such, becomes a part of the contract between the State and the railro company; and the bondholders by virtue of their interest in the origi corporation are entitled to this exemption".

The errors, we submit, are (1) that there is no condition or "consi eration" set out in the statute as an inducement to secure the constructio of the railroad; (2) the Baltimore & Eastern Shore Railroad had be constructed before Mr. Bond became purchaser, and therefore before t organization of the Baltimore, Chesapeake & Atlantic Railway Company (3) that the bondholders in the original corporation (B. & E. S. R. R. C can have no possible interest in result of this suit. Again on p. of R the Court of Appeals says: "the Court in dealing with this question w not bound to follow the rule of construction adopted by the State Cou inasmuch as the organization of the Baltimore, Chesapeake & Atlan Railway Company had been consummated and *its bondholders had ente into a contract with the State of Maryland by which it had agreed in the co sideration of the construction of said road, the said company was to be exem from taxation for a period of thirty years from the date of the completion the same.*"

Apparently the Circuit Court of Appeals falls into the error that t Baltimore, Chesapeake & Atlantic Railway Company built the said ro and that the exemption was a "consideration" from the State to that co poration, as an inducement for its construction of the said road. At mo it could have been only a minor inducement, among *the munificent pow gratuitously granted the* Baltimore & Eastern Shore Railroad Company, f purchase thereof, by Mr. Bond.

Twenty-fifth. Your petitioner represents that the *decision of United States Circuit Court* for the District of Maryland *is in direct conf*

with the "*construction*" of the aforesaid statutes, established by the two aforesaid *decisions of the Court of Appeals of Maryland*, the Court of last resort, except to this Honorable Supreme Court where a federal question is at issue.

And your petitioner further shows that the said Baltimore, Chesapeake & Atlantic Railway Company sued out a writ of error to this Honorable Court in the case of Mayor & Council of Ocean City, which upon motion was dismissed by this Court "on the authority of Lehigh Water Co. Vs. Easton, 121 U. S. 388; Central Land Co. vs. Laidly, 159 U. S. 103; Oxly Stave Co., vs. Butler Co. 166 U. S. 648; L. & N. R. R. Co. vs. Louisville, 166 U. S. 709; Ambro vs. United States, 159 U. S. 695; Powell vs. Supervisors, 150 U. S. 433," some of which cases we humbly submit settled that no federal question was involved. Lehigh Valley Water Co. vs. Easton, 121 U. S.

Twenty-sixth. Your petitioner respectfully shows that the decision and decree of the District Court of Maryland affirmed by the United States Circuit Court requires the consideration of this Honorable Court and should be reviewed:

1. Because of the *unusual importance and gravity* of the questions involved, that is to say, *the interference by the United States Courts with the State of Maryland in the discharge of its sovereign power of assessing and levying taxes for the support of the government through one of its political divisions.*

2. Because it is an ettempt to *prevent the performance of a legislative function*, delegated to the County Commissioners by the Legislature as provided for in the Constitution of the State.

3. Because of the *conflict between the Court of Appeals of Maryland and the Federal Court*, Which is correct should be decided and settled by this Court of Last Resort, so the petitioner, and the Commissioners of the other Counties of the State, through which the railroad of the Baltimore, Chesapeake & Atlantic Railway Company runs, may know what their powers and duties are.

Twenty-seventh. Your petitioner further submits that the said degree granting an injunction is erroneous.

1. Because the Baltimore, Chesapeake & Atlantic Railway Company were necessary parties to the bill of complaint, but are omitted.

2. Because the allegations of the bill are not such as required the exercise of the extraordinary power of injunction.

A. There is no direct averment of damages to the complainant.

B. Or failure or inability of the Railway Company to pay his interest.

C. Or of any effort to have the Railway Company Directors defend the said Corporation from the imposition of the alleged illegal taxation.

D. Or of any refusal or failure of the said Directors to defend the Corporation from the imposition of illegal taxes.

On the contrary the Record shows they have defended the said Corporation, and twice contested against the payment of the said taxes (Record, page 31, 10th., par., Agreed Statement, and page 89 to 96, Mayor & Council Ocean City vs. Baltimore, Chesapeake & Atlantic Railway Company, and page 97 to 112 of Record, Baltimore, Chesapeake & Atlantic Railway Company vs. County Commissioners of Wicomico County).

3. Because it should be distinctly shown or averred by the Complainant that this is not a collussive suit to confer jurisdiction upon the United States Courts, and to evade and override the decisions of the State Court.

4. Because the issue involved only a "rule of construction" of the statute in question, already settled by the Court of Appeals of Maryland, and the Bill could not justly raise the issue of the impairment of the obligation of a contract by the State, in view of Art. 3, Sec. 48 of the Constitution of Maryland, which declares "all Charters granted or adopted may be altered from time to time, or repealed."

Wherefore, your petitioner prays, That this Honorable Court will be pleased to grant a writ of certiorari requiring the appeal case of the County Commissioners of Wicomico County vs. Samuel Bancroft, Jr., to be certified from the United States Circuit Court of Appeals for the 4th. Circuit for review and determination by this Honorable Court.

Jas. O. Allen
Solicitor for Petitioner.

State of Maryland, County, to wit:

being duly sworn, deposes and says, I am the President of the Board of County Commissioners of Wicomico County, petitioner in this cause, and I have read the foregoing petition; that the same is true of my own knowledge, except those matters which are stated

upon information and belief, and of which I am credibly informed, and as to those matters I believe them to be true.

President Board of County Commissioners
of Wicomico County.

Subscribed and sworn to before me this day of October, in the year nineteen hundred and five.

In testimony whereof, I have hereunto affixed my name and set my notarial seal.

Notary Public of the State of Maryland,
in and for Wicomico County.

I hereby certify that I have examined the foregoing petition, and that in my opinion, the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

of Counsel for Petitioner.

FILE COPY.

FILED
JAN 3 1906
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. [redacted] 129

THE COUNTY COMMISSIONERS OF WICOMICO COUNTY
Petitioners

VS.

SAMUEL BANCROFT, JR.,
Respondent.

BRIEF ON BEHALF OF THE PETITIONERS FOR WRIT OF CERTIORARI.

JAMES E. ELLEGOOD,
Attorney for Petitioners.

BREWINGTON BROS. CO., 103 Main Street, Salisbury, Md.

Supreme Court of the United States

OCTOBER TERM, 1905

No. 424

The County Commissioners for Wicomico County

vs.

Samuel Bancroft, Jr.

Brief on Behalf of the Petitioners for Writ of Certiorari.

Whether the proceedings in this case should be reviewed on direct appeal, or on writ of certiorari is not so important, as whether the Petition and Record from the Circuit Court of Appeals present questions requiring the consideration of this Honorable Court.

It is respectfully submitted that they do.

FIRST. Because of the gravity of the issues involved in restraining an arm of the state government in the matter of taxation;

SECOND. Because of the alleged impairment of the obligation of a contract between the State of Maryland and one of its corporate bodies;

THIRD. Because of the direct conflict between the decisions of the U. S. Circuit Court for the District of Maryland, and the Court of Appeals of the State of Maryland upon the construction of its statutes;

FOURTH. Because, not only the Petitioner in this case, but the Commissioners of every other county through which the Baltimore, Chesapeake and Atlantic Railway runs, are entitled to know their rights, powers, duties, and responsibilities, which can only be conclusively determined by this Court of last resort in such cases where there is a conflict.

Samuel Bancroft, Jr., a bondholder of the Baltimore, Chesapeake and Atlantic Railway Company, filed his bill of complaint against the petitioners as a body corporate and as individuals, to restrain them "from in any manner assessing, levying or collecting taxes against the property, etc.,

mbraced in a mortgage dated September 1, 1894, of the Baltimore, Chesaeake and Atlantic Company to secure bonds held by the complainant, r attempting or threatening to do so." Rec. p. 12.

The question first arose on demurrer to the bill of complaint (Record age 15) and was decided adversely to the petitioner, (Respondent below) Record page 16); and then it was presented on Bill, Answer and "Agreed tatement of Facts" (Record pages 19-34) and decided adversely to the etitioners as to more than $60,000.00; and in its favor as to the residue Decree-Record page 123); by which decree it was on "the 6th day of pril, 1903, ordered, adjudged and decreed that the defendants (petitionrs herein) be, and they are hereby enjoined and prohibited from *levying, ssessing or collecting taxes* upon so much of the property of the Baltimore, hesapeake and Atlantic Railway Company, situated and being in Wicoico county, Maryland, as was formerly the property of the Baltimore nd Eastern Shore Railroad Company, constructed and built by the said ailroad under its charter to construct and build a line of railroad between ts termini at Eastern Bay in Talbot County and Salisbury, in Wicomico ounty, in this state, which said property was subsequently sold at foreosure sale of the Baltimore and Eastern Shore Railroad Company, and ecame, through this sale, the property of the Baltimore, Chesapeake and tlantic Railway Co." As to the other property mentioned in the bill of omplaint "the relief prayed for in this bill is hereby denied." This was ffirmed on cross appeals by the U. S. Circuit Court of Appeals for he Fourth Circuit. For the review of this decision the petition in this ase is filed.

There are four classes of property in the schedule, though it may be lassed as three:

1. That scheduled (a) page 32 of the Record, constructed by the altimore and Eastern Shore R. R. Co., through four counties, from Eastrn Bay, an arm of the Chesapeake Bay, to Salisbury, Wicomico County, Iaryland.

2 & 3. That bought (b) from the Wicomico and Pocomoke R. R. o., by the Baltimore and Eastern Shore R. R. Co., and certain rolling tock (c) belonging to both of these corporations.

4. That acquired by the Baltimore, Chesapeake and Atlantic Railay since its acquisition of the property in classes 1, 2 & 3. (Record pages 2-34)

The correctness of the Court's ruiling in taking jurisdiction and in joining the Petitioners is what this Honorable Court is asked to review.

Considered on the demurrer to the bill, or as made out by the "facts" agreed upon, we respectfully contend that the case is not such as entitles the Complainant to the relief prayed for or as decreed (Record pages 1-12 for the bill of complaint).

FIRST. *Is not the Bill Defective for want of proper parties, and because a decree would be ineffective?* It should have included the Tax Collector for the years 1900 and 1901, who under Art. 81 Sec. 31 Code of Public General Laws of Maryland may, "if he found it necessary, proceed by way of distress" and shall give notice, &c. Sec. 81, Sec. 49 et seq.; see also Ch. 76, Acts of 1902, local statute relating to the collecting of taxes in Wicomico County, amending Act 1894, Ch. 398. By these Statutes the Treasurer and Collector are the same and made elective.

The Baltimore, Chesapeake and Atlantic Railway Company was also a necessary party;

City of Dawson vs. Columbia Trust Co., 197 U. S. 180. This was a suit by the Trustee instead of a bond-holder. The Court said, "The bill should have been dismissed for want of jurisdiction. The water company is admitted to have been a necessary party and it, like the defendant city, was a Georgia corporation."

Against whom will the injunction be inforced? New Orleans Water Works 164 U. S. 481 held such a decree to be of no avail, although this Court had decided in favor of the complainants claim of right in the prior cases of New Orleans Water Co., vs. Rivers, 115 U. S. 674; St. Tamany Co. vs. New Orleans Water Co., 120 U. S. 64. A Court of Chancery must have all parties before it to make a decree effective. In Water Co's case above, the Court refused to give "a decree for its (city) guidance in the future", page 482.

To go against the body corporate would be ineffective and the individuals who did the assessing in November 1899 were out of office before the decree, if not before the filing of the bill of complaint, while the term of office of those who made the levies of 1900 and 1901 have expired. Then too the decree is wholly inoperative as against the Collector for 1900 and 1901, because not a party to the suit.

SECOND. *Has not the question become re-adjudicata by the Courts of Maryland?* and by this Court. See par. XIV of the bill of complaint, page 9 of Record. This decision of the Court of Appeals of Maryland is admitted and is reported in 89 Md. 89, Mayor, &c. vs. Baltimore, Chesapeake and Atlantic Railway Company. For record of this case see pp. 89-95 of Record.

This case was carried to the United States Supreme Court on writ of error by the Baltimore, Chesapeake & Atlantic Railway Co. and was presented on motion to dismiss and on the merits at the same time and was dismissed November 1900 on the authority of cases cited and can be found among the cases disposed of without opinion in 179 U. S. Reports.

Among the cases cited we refer especially to Lehigh Water Co. vs. Easton, 121 U. S. 388 and Central Land Co. vs Laidley, 159 U. S. 103, as containing the doctrine which fits the facts in this case. In the latter it was held that the obligation of the contract must have been impaired "by some act of the legislative power of the State and not by a judicial department only." These cases show that this Court had in mind the interpretation of the Statute and also whether a federal question was involved.

After this decision, the County Commissioners of Wicomico County, in obedience thereto, took up the matter of assessment of the property of this Railway Co., and gave the company due notice of their intention to assess it, and did assess it in Nov. 1899. (paragraph Tenth, Record pages 30 and 31. But the company "claimed that the same was exempt, and declined to pay the said taxes," whereupon the said County Commissioners brought suit, and recovered judgment for taxes for 1899, at September Term 1900, and this judgment was affirmed on appeal by the Court of Appeals of Maryland, in January 1901. (For Record of this case, see pp. 97-110; prayers of the Court on p. 110. For report of case see 93. Md. 113 et seq.)

It is contended by the complainant below, and so ruled by the Court, that he is not estopped by these decisions, because he was not an actual party to the suits.

The doctrine of *stare dcisis* and *res adjudicata* rests on a broader ground than technical estoppel. It has been called "a rule of rest," and is founded on public policy.

The above decisions certainly make the "law of the case," and settle the *rights* of the County Commissioners and the *duty* of the Railroad Company, which became "the thing adjudged." New Orleans vs Citizens Bank 167 U. S. 398 Covington vs First National Bank 198 U. S. 100. This is a clear attempt by a collateral proceeding to bring the Federal Court into direct conflict with the State Court, and presents the example of one Court indirectly interfering with the decision of a Court of concurrent jurisdiction and annulling its effect as between the parties. "The fact that the parties to the injunction proceedings are not the same as the parties to the judgment, or decree which it is sought to enjoin, does not relieve the case from the operation of the rule—it is to protect Courts of co-ordinate jurisdiction and avoid conflict of jurisdiction, confusion and delay in the administration of justice." 11 A. &. E. Enc. Law (2 Ed) p. 398, citing Crowley vs. Davis, 37 Cal. 269, and other cases.

The distinction between *res adjudicata* and *stare decisis*, is the difference "between a decree and the law declared by the Court which produces the decree; and though a person may not be bound by a decree as a party or privy, he may be bound so to speak by the law which produces the decree. That is to say, his rights are affected, as all other citizens rights are effected by the declaration of the law made by the Courts in the due administration of justice." 24 A. & E. Enc. Law (2 Ed.) 715 note 3, citing 60 N. J. Eq. 121, Newark City Bank vs. Crane.

The evils of such a conflict is forceably shown in the opinion of the Court, in Phelps vs. Mutual Reserve Fund L. Assn., 61 L. R. A. 717 (50 C. C. A. 339) and affirmed in 190 U. S. 147. But the complainant says his rights accrued before these decisions of the Maryland Court. The answer to that is, "the law of the case" had been settled and the thing adjudged, before he instituted his suit; and he fails to assign any reason in his bill for his delay, or for renewing the combat.

The language of this Court, in the case of the City of Dawson vs. Columbia Ave. Trust Co., 197 U. S. supra, is especially applicable just here: "The Court will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done, it is obvious that the company is on the plantiff's side, and was made defendant solely for the purpose of re-opening, in the U. S. Court, a dispute which had been decided against it in the Courts of the state."

It was there characterized as a "contrivance between friends to found a jurisdiction." The plaintiff claims to be in privity with the Railroad Company as to the benefits of its alleged "contract" with the State, yet not bound by a decision which binds the Company. While the Federal Courts are not controlled by the decisions of the State Courts in matters of general principles of the law, they deem themselves uniformly bound to follow them when *construing their own statutes;* and the jurisdiction of the Federal Court must rest on other grounds than the mere unconstitutionality of the taxes involved, Sheldon vs. Platt, 139 U. S. 591-599, reviewing the cases where injunctions were granted, and affirming Dows vs. Chicago, 11 Wall. 108.

THIRD. *Is not the bill defective in not complying with the 94th. Equity Rule; or does it allege sufficient grounds for equitable interference?*

It fails to set forth that the suit is not collusive to confer jurisdiction or to state "with particularity the efforts to secure action on the part of the managing directors, and the causes of failure." This rule, it seems was adopted immediately after the case of Haws vs. Oakland, ~~140~~ 127 U. S. 450, and referred to in Corbus vs. Alaska Treadwell G. M. Co., 187 U. S. 462, and is stated as follows: at p. 464

"If the party primarily and directly charged with a tax is unable to make a case for the interference of a Court of Equity, no one subordinately or indirectly affected by the tax should be given relief, unless he shows, not merely irreparable injury to the tax debtor as well as himself, but also that he has taken every essential preliminary step to justify his claim of a right to act in behalf of such debtor."

The Complainant alleges no damage as a fact, but says that he is *apprehensive of loss.* See (Paragraph XVIII Bill of Complaint, page 11 of Record.)

FOURTH. *Is this not in effect a suit against the State of Maryland?* The allegations in this bill (like those in the case of Davis & F. Mfg. Co. vs. Los Angeles, 189 U. S. 221,) upon which the Complainant depends for jurisdiction, are diversity of citizenship and the unconstitutionality of "the ordinance or resolution passed by the defendants, under which said taxes are attempted to be enforced—which will impair the obligation of the contract made by Chapter 133, of the Acts of Maryland of 1886." Record p. 11, paragraph XVII.

It is contended by the Complainant, and so ruled by his Honor Judge Morris, that "the imposing of a tax on this property is a legislative act, impairing the obligation of the contract of exemption, and within the inhibition of the Federal Constition." (Record page 122.)

The Circuit Court of Appeals says, "the demand on the part of the County Commissioners is in the nature of a legislative act, and therefore is in violation of Art. 1, Sec. 10 of the Constitution of the United States." We respectfully submit, the conclusion that the ordinance, or the demand, impairs the obligation of a contract, is predicated upon insufficient foundation, even though it be a "legislative act," in which event it would be the act of the State of Maryland through one of its properly constituted authorities and its unconstitutionality, the unconstitutionality of a state law, Davis & F. Mfg. Co. vs. Los Angeles, supra; this being so, the effect of this injunction is to restrain one of the "properly constitued authorities of the state" *from performing a legislative act.*

What difference is there between enjoining the Legislature itself, as a State Agency of government, and enjoining the Petitioner as a subordinate agency; both are provided for and limited by the Constitution, which says of the County Commissioners, "their powers and duties shall be such as are now, or shall hereafter be conferred by law". (Constitution of Maryland, Art. 7, Sec. 1.).

Since much of the state government is committed by the Legislature, under the Constitution of the state, to these political divisions, the effect of this decision will apply to each county and to Baltimore City, and the practical effect is to subordinate to the Federal Courts, by injunction, these governmental agencies.

It has been held that an injunction will lie against a state officer, acting merely *colori officii*, who commits a trespass; or as said in *ex parte* Ayers 123 U.S. 500, an "injunction will lie to restrain the collection of taxes sought to be collected by *seizure of property*, imposed in the name of the state, but contrary to the Constitution of the U. S., defendants being officers threatening *the distrain complained of*——are threatening a violation of the personal or property rights of the complainants, for which they are personally, or individually liable". This is called "the vital principle in all such cases." The 11 Amendment "must be held to cover, *not only suits brought against the state, by name,* but also those against its officers, agents, and representatives, where the state though not named as such, is nevertheless the only real party against which relief is asked".

When the question arises, whether a contract is impaired or not, it must be; has the State impaired it, and not whether there is a breach of it. And when the question arises in regard to a Charter Contract between the state and one of its creatures, no one but the state can *impair* it, therefore to restrain its impairment when the state is effected by suit, must be *to restrain the state*, and it does not matter whether it be the state in its whole sovereign capacity, or one of its corporate state agencies, or departments, or divisions. The distinctive words that permit an injunction against the state officers, who are assuming to act *virtute officii*, but who are in fact acting only *colore officii*, are such words as "actual invasion", "distress", "trespass", "personal liability" as trespassers, &c. No such condition is shown in this case.

The distinction is again made clear in Fitz v. McGhee 172 U. S. 53 "between some act of wrong or trespass, and a suit against officers of the state merely to test the constiutionally of a statute, in the enforcement of which those officers will act only by formal proceedings in the Courts of the state."

The case of Shelton v. Platt, 139 U. S. 591, was a bill for an injunction by Thos. A. Platt, as President of U. S. Express Co. for himself and others, against the Comptroller of the state and the Sheriff, averring that the Comptroller had issued a *distress warrant to the Sheriff and had levied* on, or was about to levy on the property of the Express Co. Mr. Chief Justice Fuller said, touching the jurisdiction: "It is asserted by counsel that a Court of Equity has jurisdiction to restrain the collection of a tax, when the tax is wholly illegal and void, and that such jurisdiction has been uniformly exercised in Federal Courts" (cases cited); "but the jurisdiction will be found to have rested on other grounds than merely the unconstitutionality of the tax involved";

FIFTH. *Is not the Rule of Construction adopted by the Court of Appeals of Maryland, the Rule of Construction for this Court?*

Whatever may be the opinion of the correctness of the decisions of the Maryland Court of Appeals, we respectfully contend that those decisions, being the *construction of the statutes* on which the complainant rests his claim, settle "the law of the case". The complainant alleges, and the U. S. Circuit Court finds that the contract is in the construction of the statute Art. 23, Sec. 188 of the code Maryland, and makes it depend

on the meaning of the word "immunities" and undertakes to discover the legislative intent from this word, because it is an apt word to include exemption from taxation. After an able review of the authorities, which sustain the doctrine that this exemption is "a personal privilege", and to be given only by "direct legislation" and not "assignable", the learned Judge says on page 121 of the Record, "it is difficult to concive what immunity in respect to this property could be meant, if not the immunity from taxation, which the original company had". With great respect, we submit that this is not the necessary inference; and it presents this dilemma; if the Court meant to *refer*, and *confine* the word immunity "to this property" and *its* exemption from taxation, then it is exclusive of other immunities. But neither this property nor this corporation was in the mind of the Legislature, and if it is used with reference to *the right* of this company, or any corporation so organized then it is made too comprehensive in order to include by implication, an immunity which is never given by implication, and which is not a positive right, nor is it necessary to gratify every positive right under the statue, or Secs. 187 et seq. of Art. 23, which constitutes a part of a general statute relating to the sale of mortgaged *railroads only*. The exemption from taxation "does not become impressed on the property itself into whosesoever hands it should afterwards come". L. & N. R. R. Co. v. Palmes, 109 U. S. 250. In this case, the officers of the corporation had exemption from militia duty. In Covington vs. Sanford. 164 U. S. 578, there was emeption from legislation regulating rates, and it was said, "the grant should be construed *strictissimi juris* when applied to the exemption from legislative control of toll", affirming Morgan vs. Louisiana, 93 U. S. 217.

The plural form of the word implies more than one immunity; therefore, in the light of the authorities, the most liberal construction can only include such "immunities" as are transferable and essential to the operation of a corporation.

In construing this statute, the Court of Appeals of Maryland, in Mayor &c. of Ocean City, vs. Baltimore, Chesapeake and Atlantic Ry. Co., 89 Md., adopted this rule of strict construction, and at page 98 says: "There is no such express statutory authority in this case. The 187 and 188 Secs. of Article 23 of the Code, relied upon by the appellant, refer to such rights and property, as would pass under the sale of a railroad mentioned in those Sections, and not to an exemption from taxation such as is presented here." This is quoted and affirmed in 93 Md. 122, B., C. & A. Railway Company vs. Wicomico Co.

. But if the rights of the plaintiff had been invaded, it was not y the Petitioners, who acted only in conformity with the decisions Court of Appeals of Maryland, which had given a construction of tute in connection with the facts; and it is the rule of this Court ow such construction, 5 How. 342, Bank vs. Buckingham, holding he application of an earlier banking law to a bank subsequently ed, is one of construction and not of validity. The same principle l in Baltimore vs. Hopkins, 130 U. S., 223; Central Land Co. vs. y, 159 U. S. 110, *where it was one of construction and not of validity.* construction of State statutes the case of the State Railroad Tax 92 U. S. 575-617 declares the decision of a State Court to be "the f Decision" of the Federal Court; Fairfield vs. Galatin Co., 100 U. Wilson vs. Standefer, 184 U. S. 412.

the case of Gulf & S. Island Co. vs. Hewes, 183 U. S. 68, this was asked to correct the decision of the Supreme Court of Miss. but e 75 it is said: "The whole foundation of our jurisdiction in this class s must rest upon a contract which can not be legally impaired". ll the Court's attention to Sec. 2, Acts of 1886, Ch. 133, which ex- not only the property of the Baltimore & Eastern Shore R. R. Co., so "the shares of capital stock and bonds" of the Company. By Sec. stock is *limited* to $500,000.00, while by the Charter of the Balti- Chesapeake and Atlantic Ry. Co. (Record page 71) the capital stock "this corporation shall be $1,000,000.00". Now if the exemption 6 is not lost, it follows by the creation of this new corporation, that l of $500,000.00 of shares there are $1,000,000.00 of shares exempt, nds in proportion, without the authority or knowledge of the Leg- re.

3. We here submit that the Act of 1876, Chapter 322, Codified in 3, Sec. 302, Code of 1888, being Sec. 417 of Art. 23, of late Code *sets at rest the proper construction* of this Article, as to exemption taxation, whatever other meaning may be given to the word "immu- ".

Nothing in this Article contained shall be construed as to bring any supposed exemption from taxation, State, County or Municipal, Charter of any Company desiring to take advantage of any of the ions in this Article contained, any property, real, personal or mixed, l under or by virtue of any of the provisions of this Article, or any preferred or otherwise, or any bonds or other evidence of debt issued or by virtue of any of the provisions of this Article".

SIXTH. But independent of the decisions of the Court of Appeals of Maryland, the larger questions are:

1. *Is there a contract of Exemption* between the State of Maryland and the Baltimore, Chesapeake & Atlantic Ry. Co.?

2. What has the State done that it did not have the power to do in regard to this exemption?

To raise a contract, the Complainant relies on several constituent facts:

A. The Act of 1886, Ch. 133, enlarging the original charter powers of the Baltimore & Eastern Shore R. R. Co., in which the exemption was granted it for thirty years. Bill of complaint, paragraph III, page 253 of Record.

B. The Mortgage from this corporation to the Atlantic Trust Co., pages 47 and 68, and paragraph VI, page 5 of Record.

C. The decree of foreclosure by the U. S. Circuit Court for the District of Maryland. Record, page 35.

D. The sale to Mr. Nicholas P. Bond, and its ratification. Record, Page 45, and paragraphs VII, VIII, IX, Page 6.

E. The forming of the Baltimore, Chesapeake & Atlantic Ry. Co. by him and his associates. Record, Page 71 for Charter.

F. The construction and application of Sec. 187 and 188 et seq., Art. 23 of the Code of Public General Laws of Maryland to the above state of facts. Record, Page 7, paragraphs X, XI, XII.

1. There ought to be no doubt about the rights and powers in two stages of this evolution of rights and powers.

a. That the Baltimore & Eastern Shore R. R. Co. did have *a gift, but not a contract* of exemption.

b. And that it could not assign or mortgage this exemption to the Atlantic Trust Company.

An exemption from taxation is not a vested right, a property right, or a positive right, 67 N. Y., 116, People vs. Supervisors; 161 U. S. 662, Pearsol vs. Great Northern R. R. Co., holding that it is only such rights as are necessary to the full enjoyment that are contracts.

The root of the alleged contract is in Sec. 2, Ch. 133, Acts of 1886, giving the exemption to the Baltimore & Eastern Shore R. R. Co., but this

exemption was not a part of the original Charter of this corporation, and the grant is a mere gratuity.

Appeal Tax Court vs. Grand Lodge, 50 Md., 428.

Rector vs. Philadelphia, 24 How. 300

Grand Lodge vs. New Orleans, 166 U. S. 148.

People vs. Commissioners, 47 N. Y. 504.

2. The U. S. Circuit Court of Appeals argues "that there is a general inclination on the part of Legislatures to grant immunities to railroads and other corporations with a view to encouraging the development of particular sections" etc. This argument as the reason or ground for the contract, is fully answered in the case of Wis. & M. R. R. Co. vs. Powers, 191 U. S. 386. The first question was whether the general statute of 1897 repealed the law of 1893, giving a qualified immunity from taxation to any railway company hereafter building and operating a line of railway within the State north of parallel 44, of latitude until, &c.

The Court held that the Act of 1897 did repeal that of 1893, else "the plaintiff would have no standing in Court", and then proceeded with "the first and main question, whether the Act of 1893 purported to make an irrevocable contract with such railroads as might thereafter comply with its terms. The question is pretty well answered by a series of decisions of this Court, A distinction between an exemption from taxation in a special charter and a general encouragement to all persons to engage in a certain class of enterprise is pointed out in East Saginaw Mfg. Co. vs. East Saginaw, 13 Wall. 373".

The differentiation between a *contract* in terms of a bargain by the state with one of its corporations, and a *gift* from the state is so clearly set forth in the case of Wis. & M. R. R. Co. vs. Powers (supra) and is so appropriate in several respects as to seem decisive of this case. *The complainent does not rely upon a special charter, or exemption given to it, but to a special exemption given to another corporation and upon "the general encouragement"* (not to build a railroad), *but to take over, under a general law (Art. 27, Sec. 187 &c.) any mortgaged railroad corporation,* that has been sold. The decision proceeds: "the broad ground in a case like this is that in view of the subject matter, the Legislature is not making promises, but framing a scheme of public revenue and public improvement".

The scheme of Art. 23, Sec. 187 et seq., applying only to the sale of rail roads, was to provide an easy, expenditious and cheap method for the purchaser and his associates to form a new corporation, and to transfer to it all that he bought under the mortgage. "In announcing this policy and providing for carrying it out, it may open a chance for benefits to those who comply with its conditions, but it does not address them, and, therefore, it makes no promises to them". The purchaser under the Act and Secs. named is not "addressed." He is only empowered to do something if he wishes; and it is impossible to address a corporation not *in esse*, and that may or may or not be formed *in furturo.*

The vice and danger of the claim made is most forcibly stated. "It would be quite intolerable, if parties not expressly addressed, were allowed to set up a contract on the strength of their interest in, and action on the faith of a statute, merely because their interest was obvious and their action likely on the face of the law. What we have said is enough to show, that in our opinion, the plaintiff never had a contract, and, therefore, makes it unnecessary to consider the usual power to alter, amend, or repeal charters, contained in the Constitution of Michigan". W. & M. R. R. Co. vs. Powers.

But *what promise* has the Balto., Ches. and Atl. Ry. Co. made to the state? And what has it done to its own detriment to bind the state? It found a magnificent charter and a railroad already built, and entered into possession thereof.

According to the theory of the Complainant, *the state gives all and takes nothing—and conversely, the railroad corporation has a right to demand all and give nothing.* The analogy, both in fact and reason, in the case of the Ches. & Ohio R. R. Co. vs. Miller, 114 U. S. 177, to this is striking. There the railroad company was incorporated under a statute providing for the purchase of an insolvent corporation, and claimed the exemption of the former. In speaking of the later statute, the Court said: "*The subject matter of this legislation was not the original construction of the railroad, but the operation of a railroad, already constructed.* The state was not in the attitude of a contractor soliciting subscriptions of captial stock, &c. It was legislating in reference to enterprises already undertaken, prosecuted, and completed by companies originally thus incorporated," and is the exact condition of this case.

Referring to the statute as creating a contract and stating their conclusions, as above, the Court also said: "Were it otherwise,—we should nevertheless be compelled also to hold on distinct grounds, that the exemption thus conferred did not constitute a contract prohibited from repeal". In the case of the Phoenix In. Co. vs. State of Tennessee, 161 U. S. 175, this Court held that there was *no contract, and no Federal question* involved in the case.

That the grant of exemption is a gratuity and not a contract, see Tucker vs. Ferguson, 22. Wall. 527-576, which is a leading case.

SEVENTH. These corporations carry two distinct legal ideas or rights:

1. The right or franchise to be a corporation—its corporate existence.

2. The franchise of maintaining, operating and owning it, and such substantial rights as are essential to these ends.

Now what did the *Baltimore & Eastern Shore Railroad Co. mortgage to the Atlantic Trust Co.*, and what *did Mr. Bond buy at the foreclosure sale?*

This is best answered by reference to the cases of Memphis & Little Rock Railroad Co. vs. Berry, 112 U. S., page 609; and People ex rel Schurtz vs. Cook, 148 U. S., page 397 (S. C. 110 N. Y. 443) since these cases are so analogous in principle, and the cases of Memphis & Little Rock Railroad Co., goes so on all fours with this, as to be conclusive. In the original charters in both of these cases there were exemptions from taxation granted by the Legislature; mortgages by the Railroad to secure bonds; sales under the mortgages; the right of purchasers to reorganize under statutes like the Maryland statute; and giving to the reorganized corporations "all the corporate rights, liberties, privileges, *immunities*, powers and franchises of and concerning the railroad so sold, etc.", Memphis Railroad Co., 112 U. S. page 614.

The same powers, with the same word "immunities" were in the New York Statute of Reorganization. In the Arkansas case, supra, there was a "bill to enjoin the Railroad Commissioners from appraising for the purposes of taxation any property of the plaintiff in error, on the ground that it is exempted from taxation by a contract with the State contained in its charter of incorporation". After holding that "the franchise of being a corporation belongs to the corporators" and that the "corporation has no

power to dispose of this franchise", (page 619) and after holding that the Reorganization Statute was "a *matter of law and not of contract*, and conferred only the *right* to organize as a corporation", upon the purchaser or bondholders, even "if in the charter under consideration, it had been conferred in express terms", (page 621), the Court says: "Our conclusions then are, that exemption from taxation contained in 2d Sec. Act of Jan 11th, 1853 was intended to apply only to the Memphis & Little Rock Railroad Co., as the original corporation organized it; that it did not pass by the mortgage of its charter and works" et seq.

In the case of the People vs. Cook, supra, the contention was that the reorganized corporation was not liable under the Act of 1886 for the franchise tax of ½ of one per cent. on its capital stock. Mr. Peckam, J, in 110 N. Y. page 448, says, "the counsel for the appellants claim that the Act of 1886 applies to cases where the State grants franchises to a corporation, and it was stated that none was granted in such a case as this. They also argued that the reorganization Act of 1874, amended in 1876, in such a case as this simply continued or revived the franchises of the old corporation under the same charter and with the same immunities and rights held by the former company. Lastly, they claimed that the Act of 1886 was unconstitutional in violation of the provisions of the Federal Constitution. We think none of these claims is well founded", and the Court also holds that the reorganization acts "were in no sense contracts on the part of the State"; relying on Memphis & L. R. R. Co., supra. On writ of error, this conclusion was sustained by this Court. Same case in in 148 U. S. 397. At page 404, after quoting with approval Judge Peckam's opinion and answering the argument of counsel made against it, this Court affirms the decision. We submit that the exemption, being a personal privilege of the Baltimore & Eastern Shore Railroad Co., and not assignable, and the corporate existence of that Company being the franchise of the corporators and not transferable, it follows that if its corporate existence is still extant then this exemption belongs to or inheres in its being; or if it is dissolved then the exemption passed away with its dissolution as in the case of a natural person.

Suppose Mr. Bond had operated this railroad, as he had a right to under the cases just cited; or suppose that he had sold it to some corporation already existing, authorized to buy and operate it, could it be successfully contended that either he, or this corporation, would have the exemption granted the Baltimore and Eastern Shore Railroad Company?

EIGHTH. *What has the State done in violation of Art. 1, Sec. 10 of the Constitution of the United States?*

1. The power of the Legislature, under *Art. 3, Sec. 48* of the *State Constitution*, to alter or amend the charter is conceded by the plaintiff and by the Court. As a matter of law and fact, has not the State, by the General Assessment Law of 1896, Chapter 120, repealed the exemption? Sec. declares, "All state and county taxes shall be levied upon assessments made in conformity to the provisions of this Article, and in conformity with all laws relating to revenues and taxes not embraced in this Article." In the following Section, specifying what property shall be taxed, is the following: "*The property, real and personal, of each and every railroad company in this State, working its road by steam power, shall be valued and assessed for county and municipal purposes, in the same manner as the property of individuals may be valued and assessed under this Act.*" Then follows a section giving exemptions. This repeals the exemption because of the repugnancy between the exemption in the statute, and "the statute which was intended as a revision of the laws upon the subject of taxation."

Columbia Mfg. Co. vs. Vanderpool, 4 Cowen 556.

The Act of 1896, Sec. 2, page 188, "exceptions and provisos," reserves from its operations any "irrepealable contract or obligation", but reserves no special exemptions. State vs. N. C. R. R., 90 Md. 472, for repeal by implication. To tax "each and every railroad company in this State in the same manner as individuals" must take in this company.

In N. C. R. R. Co. vs. State of Md., 187 U. S., 266, it was contended by the corporation that the assessment law of 1890 did not repeal the Compromise Act of 1880, and if so, then it was a void Act; but the Court of Appeals of Maryland held otherwise, and was affirmed in this Court.

2. What constitutes the "Legislative act"?

The Circuit Court says, "That the exercising of the taxing power is a legislative act", and violates the Constitution, and the Circuit Court of Appeals says the "demand", etc.

The "taxing power" of assessing was completed in Nov. 1899, and the power involved in the annual levies of 1900 and 1901 were exercised in June of each year. These powers became executed before the filing of the bill of complaint and can not now be restrained; while the levies of the future year were yet to be declared. The prevailing rule in states

which have allowed injunctions to restrain municipalities have only permitted restriction of the enforcement, but not of the passage of even "unauthorized orders and resolutions, or ordinances of municipal corporations". 18 L. R. A. 835 (144 Ill.) Stevens vs. St. Mary's Training School; and refuse to restrain their enforcement, where they are within the jurisdiction, or the exercise of the legal powers of the municipalities. 4 L. R. A. 617 (Ala.) Montgomery Gas Light Co. vs. Montgomery; Des Moines Gas Co. vs. Des Moines, 44 Iowa 55, sustained the doctrine that legislative action of these corporations can not be enjoined. New Orleans Water Co. vs. New Orleans, 164 U. S. 481, holding that "a court of equity can not properly interfere with, or in advance restrain the discretion of a municipal body while it is in the exercise of powers that are legislative in their character—ordinances, if legally enacted, have the force of laws passed by the Legislature of the state, and are to be respected by all."

The relief prayed for in that case was to compel the city to cancel ordinances and grants, and if the city refused, then for the Court to declare them null and void, and to restrain future grants. All of which was refused, even to prevent "multiplicity of actions".

It is conceded in paragraph "Tenth", "Agreed Statement of Facts" page 30 of Record, "That the said Board had the power to assess such property as was liable to taxation, and that it had been omitted from assessment by the general assessors of the said county". This power is vested in the Board by the General Assessment Law of 1896, Chap. 120, Sec. 182, and in Art. 81, Sec. 10 of the Code. And by Art. 7, Sec. 1 of the State Constitution "their powers and duties shall be such as are now, or may hereafter be prescribed by law". There being no doubt about the "power and duty" of the Petitioners, the Court is asked to restrain the exercise thereof.

In 16 A. & E. Enc. of Law, (2 Ed) 423, under the headlines "Enjoining Legislative or Executive Action", it is thus laid down: "Legislative enactments of a state, or of a municipal corporation within the scope of its powers, can not be restrained by injunction, even if the threatened act, if passed, will be unconstitutional and void". *Legislation is the exercise of a political power, and taxation is one of the most important powers of the State. What does it matter whether the State, in the General Assembly exercises it, or whether for convenience, it delegates the power to some subordinate division of the State? The principle is the same.*

NINTH. *Is there any doubt about the right of this railroad company to this exemption?* If so, that must be resolved in favor of the State. Phoenix Co. vs. Townsend, 161 U. S. 177, holding that the "exemption must be made out wholly beyond doubt"; and "must be granted in terms too plain to be mistaken".

Chicago B. & K. Co. vs. Guffey, 120 U. S. 569 575, says: "It can not exist by implication; a doubt is fatal to the claim". Chicago Theological Seminary vs. Illinois, 188 U. S. 672, and many other cases using like strong language.

This statute, to support the complainant's contention, must be thoroughly reconciled with the presumption against exemption, with that exactness and directness demanded by all the authorities relating to these exemptions; it must be reconciled with the revenue laws of the state and with the general policy and sovereign power of the state, in regard to taxation, expressed in Art. 15 of the Bill of Rights, that "Every person in the state, or person holding property therein, ought to contribute his proportion of public taxes for the support of the Government, according to his actual worth in real or personal property".

But whatever doubt, if any, may have existed as to the proper construction of Sec. 177-188 et seq. Art. 23, it has been removed by the decision of so able a tribunal as the Court of Appeals of Maryland, which has established the law in Maryland, and for the citizens thereof.

But if this question were *res intregra* in a Court of competent jurisdiction for decision, the sole questions would be, not the impairment of a contract, but did the exemption revive upon the formation of a new corporation, *ipso facto*, under Sec. 187, etc., Art. 23; and if so, has the Legislature repealed the exemption by the General Assessment Law of 1896. It seems to the petitioners that this is a local or state matter, in any phase of it.

But whether the contention of the Petitioners be correct or not, it is most respectfully submitted, that the importance of the question and the conflicting decisions, require the consideration and decision of this Honorable Court, to the end that uniformity and harmony may be established.

Respectfully Submitted,

JAMES E. ELLEGOOD,

Attorney for Petitioners.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 129.

Office Supreme Court U. S.
FILED
SEP 26 1906
JAMES H. McKENNEY,
Clerk.

The County Commissioners of Wicomico County, Md.
Petitioners

vs.

Samuel Bancroft, Jr.
Respondent.

Supplemental Brief on Behalf of the Petitioners.

JAMES E. ELLEGOOD,
Attorney for Petitioners.

BREWINGTON BROS. CO., 103 Main Street, Salisbury, Md.

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 129.

The County Commissioners of Wicomico County, Md.
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vs.

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Supplemental Brief on Behalf of the Petitioners.

Relying on the points and authorities in the brief filed with the petition for the Writ of Certiorari, we beg leave to submit some additional authorities and suggestions.

The jurisdiction and the merits of this case depend upon the correctness of the plaintiff's contention that the State of Maryland has passed a law impairing the obligation of a contract between the State of Maryland and the Baltimore, Chesapeake and Atlantic Railway Company, in violation of Sec. 10, Art. I of the Constitution of the United States.—Record, Paragraph XVII of the Bill of Complaint.

This naturally presents two questions: 1. Has the State imposed upon itself "the obligations of a contract?"; and 2. Has the State "passed a law" impairing those obligations?

If there is no contract, or if there has been no law passed by the State impairing its obligations, then there is no case.

The "obligations of a contract" were discussed both by the eminent counsel and the Court in the case of Ogden vs. Saunders, 12 Wheat. 214. Mr. Justice Trimble at page 319 says, these "obligations consist in the

right of the party to demand from the other party what is due———and enforce the performance, or take an equivalent for non-performance". Mr. Justice Washington says, "It is the law which *binds* the parties to perform their agreement". Mr. Chief Justice Marshall speaks of it as "the agreement of the parties, and if it be not illegal, to *bind* them to the extent of their stipulations".

With these definitions and expositions of a contract and its obligations, it is a contradiction to speak of a contract that is not *binding in law;* that can be dissolved or recalled by either party at its pleasure, and leaving no power to enforce it. To speak exactly, there is no revocable or repealable contract. Such an agreement amounts to no more than a revocable license, or privilege.

It is admitted that the Constitution of Maryland, Art. 3, Sec. 48 not only gives the power to revoke this so called contract of exemption, but it also restrains the Legislature from entering into irrevocable agreements with these corporate creations of the State.

It follows, therefore, that the amended Charter of the Baltimore and Eastern Shore Railroad Company, 1886, Chapter 133 of the Acts of Assembly, granting an exemption from taxation has no enforceable legal "obligation",—a privilege only, as long as it lasted, and at the State's pleasure. If this grant has no higher quality, how can the State "impair," speaking in the light of the Constitution, "obligations" which do not exist?

While the Complainant admits that lack of *binding* efficacy, in this alleged contract, upon the State, yet he insists that the State has passed a law impairing "obligations" which are at best not legal, but moral obligations, of which Courts do not take judicial notice.

This law of the State, according to paragraph XVII, page 10 of the Record, lies in the "proposed assessment, levying and collection of taxes by the defendant against the Baltimore, Chesapeake and Atlantic Railway Co., and the ordinance or resolution passed by the defendant, under which the said taxes are to be enforced".

One of two alternatives is at the choice of the Complainant, and the result is the same in either case.

If this be a "law of the State", it is such a law as the State has the power under the Constitution to pass, and is not within the inhibition of

the U. S. Constitution; or if it be not a "law", but an administrative and executive act, on the part of the County Commissioners, then Art. I, Sec. 10 has no application.

If this "proposed assessment" &c. be a "law" of *the State*, the injunction should fail because it is an effort to restrain "proposed" legislation by the State, and also because it is contrary to the Eleventh Amendment, forbidding suits against the State,—Haygood vs. Southern, 117 U. S. 52, holding that, "A bill in Equity does not lie when brought against officers and agents of the State, having no personal interest in the subject matter of the suit". In re Ayers, 123 U. S. at page 504, Mr. Justice Matthews calls attention to the essential difference in a contract between individuals which are protected by the contract clause of the Constitution and a contract between the State and individuals, and declares that "no action will lie against the state or its officers, the object of which is to enforce its performance, or forbid its breach". The effect of an injunction in this case, must be either to compel a performance, or stop a breach of the alleged contract, by the constituted officers of the State in the discharge of so important a function as assessment and levy of taxes.

The case of New Orleans Water Co. vs. La. Sugar Co., 125 U. S. at page 38 explains the conditions under which the jurisdiction of the Federal Court may or may not attach, when the State has passed "a law subsequent" to the contract. Suppose we regard the assessment as a law subsequent to the alleged contract, still the Court of Appeals of Maryland has "decided" to use the language of N. O. Water Co. *supra*, "on grounds independent of that law, that the right claimed was not conferred by the contract and the case stands just as if the subsequent law had not passed".

Whatever we may call this exemption, whether a mere gratuity, or a privilege, or a revocable contract, it existed not as a vested contractual right protected by the Constitution of the United States, but only as a matter of grace growing out of a statute, temporary in its character, because repealable at any time by the State.

In this aspect, it is a state and not a federal question.

Three times has the Court of Appeals of Maryland decided against this immunity claimed—two of which are in the Record in this case, pp. 89-112, and the cases are reported in 89 Md. 98; and 93 Md. 122, render-

ed before this suit was instituted. The third was decided in the case of the B., C. & A. Ry. Co. vs. County Commissioners of Wicomico County, at the January Term, 1906, in the opinion filed Feb. 27, 1906, and reported in the Atlantic Reporter, and will be printed in Vol. 103 of the Maryland Reports.

Judge Schmucker, in reviewing the whole case in an able opinion, refers to the decision of the U. S. Circuit Court of Appeals, now pending before this Court, and says, "We are unable to agree with the conclusion reached that the word 'immunity' as used in Sec. 188, was placed in there 'for the purpose of exempting from taxation all companies which had been granted exemption by the legislature in the first place". He proceeds to say, "In the first place Sec. 187 &c. were intended simply, as they declare on their face, to afford purchasers of railroads and their associates, an opportunity to [illegible] entirely new corporation; secondly, Sec. 188 is silent on the subject of the taxation and the general expressions there used——do not amount in our judgment to the 'clearest and most unambiguous language', or manifest that 'express and clear intention of the law' held to be indispensable to create an exemption from taxation". "Furthermore, the exemption from taxation which was enjoyed by the Baltimore & Eastern Shore R. R. Co., did not rest on *contract*", citing Tucker vs. Furgerson, 89 U. S. 575; West Wis. R. R. Co. vs. Supervisors, 93 U. S. 595; Grand Lodge vs. New Orleans, 166 U. S. 149, fully sustaining the learned Judge's opinion.

"But conceding", says the Court, "for the sake of the argument that the Balto., Chesa. and Atlantic Ry. Co. obtained this exemption, it was repealed by the assessment law of 1896, Chap. 120 ("of the Acts of Assembly of Maryland"). "Our conclusions upon the whole case are" (we give a summary) 1. That the exemption was intended to apply only to the Baltimore & Eastern Shore R. R. Co.; 2. It was not transferable, and did not pass under the mortgage, or "otherwise"; 3. That the Balto., Chesa. and Atlantic Ry. Co. did not acquire this exemption by virtue of Secs. 187 &c. Art. 23.; and 4. If it did acquire this exemption, "It was recalled or extinguished by the Assessment Law, Acts of 1896, Chap. 120".

The authority of the two decisions, rendered before the bringing of this suit and the *ratio decendi* in the case just cited, effectually disposes of the controversy, which is one touching the construction of a state statute and not of constitutional law.

Railroad Cases vs. Gaines, 97 U. S. 697, holding that the decision of the Tenn. Sup. Court "is binding as a construction of the state statute by the highest court of the State".

That case being before this Court on a Writ of Error from the Supreme Court of Tenn., the Court added, "While we are not bound by the decision of the present case—the decision ought not to be over-ruled unless it is clearly wrong. The delicate power which we have, under the Constitution of the U. S. over the judgments of the State Courts ought always to be used with great caution. There should be no reversal of such judgments, unless the error is manifest".

We respectfully submit, whether this Honourable Court, if the last decision of the Court of Appeals of Maryland were before it on Writ of Error, would reverse it on the ground that "the error was manifest", or on the ground that the grant of exemption from taxation to the Balto., Ches. and Atlantic Ry. Co. is "direct" and "specific resting on a contract"; or that it is entitled to it by the clearest and most unambiguous language, or beyond *doubt*, in the face of these decisions of so able a Bench.

When it is admitted that the Legislative Department of a State is sovereign within its sphere and may do as it sees fit, when not restrained by the Constitution, we may ask, is not the Judicial Department, also sovereign within its sphere, entitled to equal consideration, or will it be accorded less dignity and respect for its judicial determinations that do not violate the Constitution, than are given to legislative acts that violate no constitutional principle.

But we submit, in conclusion, that these decisions of the Court of Appeals of Maryland are fully supported by the cases of the Memphis R. R. Co. vs. Berry, 112 U. S. 609; and People vs. Cook, 148 U. S. 397, both of which were decisions in railroad cases, construing re-organization statutes of the States of Arkansas and New York, respectively, containing the word "immunities", under conditions involving similar principles as in the pending case.

Respectfully submitted,

JAMES E. ELLEGOOD,
Attorney for Petitioner.
Deft. below.

FILE COPY.

Supreme Court of the United States

OCTOBER TERM, 1905.

No. 129

Office Supreme Court U. S.
FILED
FEB 14 1906
JAMES H. McKENNEY,
Clerk

THE COUNTY COMMISSIONERS OF WICOMICO COUNTY
Petitioners

VS.

SAMUEL BANCROFT, JR.,
Respondent.

MOTION ON BEHALF OF THE PETITIONERS TO ADVANCE CASE FOR HEARING.

JAMES E. ELLEGOOD,
Attorney for Petitioners

Brewington Bros. Co., 103 Main Street, Salisbury, Md.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

NO. 424.

THE COUNTY COMMISSIONERS OF WICOMICO COUNTY

vs.

SAMUEL BANCROFT, JR.

MOTION ON BEHALF OF PETITIONERS TO ADVANCE THE ABOVE CASE FOR HEARING, WITH REASONS FOR SAME.

The Petitioners respectfully pray the Court to advance the hearing of the above cause, and beg leave to assign reasons therefor as follows:

FIRST. It is a case involving revenue to the County of Wicomico to a large amount, whereby the county is much embarrassed, as well financially as in the rights and duties of the Commissioners themselves.

It will be seen from the Record that it involves a conflict of decisions between the Court of Appeals of Maryland and the United States Circuit Court for the District of Maryland, by a comparison of the case of the Baltimore, Chesapeake and Atlantic Railway Company vs. County Commissioners of Wicomico County, 93 Md., 113, with the case before this Court.

SECOND. The Record shows that an injunction was granted by the U. S. Court forbidding assessment of a part of the property of the Baltimore. Chesapeake and Atlantic Railway Co. now in controversy, which the Maryland Court of Appeals had decided was liable to assessment.

The Plaintiff below, Mr. Bancroft, as well as the Baltimore, Chesapeake and Atlantic Railway Company, disputed the liability of the railway company for any part of the taxes, so that the whole amount of taxes for the year 1900 inclusive to the year 1905 inclusive are still unpaid.

THIRD. The whole assessable basis of the county amounts to about $6,000,000.00 only, while the amount involved in this case amounts to $645,607.00, (Rec. pp, 32-34) the annual revenue therefrom being over $5,000.00, making more than $30,000.00 unpaid, to say nothing of accrued interest.

FOURTH. Aside from the financial embarrassment, the Petitioners are in the awkward dilemma of being compelled to obey the injunction of the U. S. District Court and omitting to assess and collect taxes upon the property decided by that Court to be exempt; or on the other hand, of following the decisions of the Court of Appeals of Maryland, which had previously decided that this property should be assessed and taxed and which had been assessed before the injunction.

If the Petitioners should strike from the assessment books, or omit to assess, the property which has been decided to be exempt by the U. S. District Court, and this Honorable Court should decide otherwise, then your Petitioners would be de-

barred from levying back taxes, under the decision in the case of *Baltimore, Chesapeake and Atlantic Railway Co. vs. County Commissioners of Wicomico County*, 93 *Md. 113*, which decides that the powers of the County Commissioners are exhausted in each current year.

It will be seen from the decision of the Baltimore, Chesapeake and Atlantic Railway Co. *supra* that the county lost the taxes for three years prior to 1899, because of their failure to assess and levy prior to that year.

Because of these legal and financial embarrassments, and the uncertainty of the status and duties of both the County Commissioners and the Railway Company, it is respectfully submitted that the exigencies of the case require a speedy hearing, to the end that they may be determined, and the dispute and litigation may be brought to a close, which has been pending in divers shapes for the past six years.

Respectfully Submitted,

JAMES E. ELLEGOOD,

Attorney for Petitioners.

MR. JAS. H. MCKENNEY,

Clerk of the U. S. Supreme Court:

Please file the above motion, and oblige,

Jas. E. Ellegood

Attorney for Petitioners.

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Office Supreme Court U. S.
FILED
JAN 15 1906
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. ~~129~~

COUNTY COMMISSIONERS OF WICOMICO COUNTY, *Petitioners,*

vs.

SAMUEL BANCROFT, JR., *Respondent.*

Brief on Behalf of Respondent in Opposition to the Petition for Writ of Certiorari.

NICHOLAS P. BOND,
Solicitor for Respondent.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 424.

COUNTY COMMISSIONERS OF WICOMICO COUNTY, *Petitioners,*

vs.

SAMUEL BANCROFT, JR., *Respondent.*

Brief on Behalf of Respondent in Opposition to the Petition for Writ of Certiorari.

STATEMENT OF FACTS.

The respondent, a citizen of the State of Delaware, filed a bill in the Circuit Court of the United States for the District of Maryland, alleging that he was the owner of the mortgage bonds of the Baltimore, Chesapeake and Atlantic Railway Company and had been such a holder ever since the year 1896; that the defendants, the County Commissioners of Wicomico County, named in the bill, had levied taxes on the property of the Railway Company, which property had been

conveyed by way of mortgage to secure the complainant's bonds, and were threatening to sell the same for non-payment of such taxes; that the levying of the taxes if permitted, would put a lien upon the property prior to the lien of the mortgage securing the complainant's bonds, and the sale of the property for such taxes would deprive the complainant of such security. The bill prayed an injunction against the levying of the taxes and the Court below granted such an injunction as to a part of the property included in the bill, which decision was confirmed by the Circuit Court of Appeals.

An agreed statement of facts was filed in the case, from which the following facts appeared:

First. That in the year 1886 a railroad was incorporated by the State of Maryland, known as the Baltimore and Eastern Shore Railroad Company; that by the second section of the Charter of that Company the General Assembly of Maryland had provided as follows:

> "SECTION 2. *And be it enacted,* That said corporation shall have perpetual existence, and its franchises, property, shares of capital stock and bonds shall be exempt from all State, county, or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the *termini* mentioned in its charter."

Second. That the above mentioned road was completed between the *termini* mentioned in its Charter in August, 1891.

Third. That after such completion said road went into the hands of a Receiver and was sold under foreclosure of mortgage, such sale taking place in the year 1894.

Fourth. That the purchaser at the foreclosure sale organized a corporation, known as the Baltimore, Chesapeake and Atlantic Railway Company, under Section 187, of Article 23, of the Code of Public General Laws of Maryland, which

section provides, that in case of the sale of any railroad under foreclosure of mortgage, the purchaser may form a corporation for the purpose of owning, possessing, maintaining and operating such railroad by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors, etc., etc.

Fifth. That the Statute of Maryland, providing for the organization of such a corporation, further provides as follows:

> "Section 188. Such corporation shall possess all the powers, rights, *immunities*, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same, which were possessed and enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter and any amendments thereto and of any other laws of this State."

Sixth. The Baltimore, Chesapeake and Atlantic Railway Company so organized, issued its mortgage bonds, of which the complainant in the year 1896 became the owner of twenty of the par value of $1,000 each.

Seventh. That in the year 1899 the Court of Appeals of Maryland in a case between the Baltimore, Chesapeake and Atlantic Railway Company and the Mayor and City Council of Ocean City, Maryland, reported in 89 Maryland, page 89, held that the property formerly belonging to the Baltimore and Eastern Shore Railway Company was not exempt from taxation in the hands of the Baltimore, Chesapeake and Atlantic Railway Company, the above mentioned statutes, properly construed, not carrying such exemption.

Points of Laws.

Upon the aforegoing facts the Circuit Court and the Circuit Court of Appeals decided the following points of law:

First. That the complainant, a citizen of the State of Delaware, was entitled to maintain his bill and was not bound by the decision of the Court of Appeals of Maryland in cases to which neither the complainant nor the trustee in the mortgage deed of trust, securing the bonds held by him, were parties.

Second. That the United States Court was not bound to follow the decision of the Court of Appeals of Maryland in construing the above mentioned statutes, but that it appearing that the complainant had become a bondholder long before the decisions of the Maryland Courts were rendered, and at a time when there had been no decision of the State tribunals, he was entitled to the independent judgment of the Federal Courts, as to the law applicable to the case.

Burgess vs. Seligman, 107 U. S. 33.
Carroll County vs. Smith, 111 U. S. 562.
Anderson vs. Santa Anna, 116 U. S. 362.

Third. That section 188 of the Public General Laws of Maryland, which granted to the Baltimore, Chesapeake and Atlantic Railway Company all the powers, rights, *immunities*, privileges and franchises which were possessed and enjoyed by the Baltimore and Eastern Shore Railroad Company, granted to the Baltimore, Chesapeake and Atlantic Railway Company, among other things, immunity from taxation, which was possessed and enjoyed by the Baltimore and Eastern Shore Railroad Company.

Trask vs. McGuire, 18 Wallace, 391.
L. & N. R. R. Co. vs. Palmes, 109 U. S. 251.
Phoenix Insurance Company vs. Tenn., 161 U. S. 174.
State Board of Assessors vs. Morris and Essex R. R., 49 N. J. 193.

REASONS WHY WRIT SHOULD NOT BE GRANTED.

The respondent submits that there is nothing in the decision so rendered which justifies the granting of a writ of *certiorari*.

The points of law decided rest on the long established and well considered decisions of this Court, and constitute in fact merely the application of the well known and long decided rules of law to the facts in this particular case.

It is quite true that the bill alleged, and the Court below held, that the action of the County Commissioners in levying this tax was also the passage of a law impairing the contract, but this decision of the constitutional question was unnecessary to the decision of the case, it appearing that the complainant was entitled to relief whether he was right or wrong in the constitutional question involved.

The other points raised by the petitioner in his petition and brief are either immaterial or were not raised below, and certainly present no reason for the granting of the writ.

This respondent respectfully submits that the writ should be denied.

NICHOLAS P. BOND,
Solicitor for Respondent.

No. 129.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

Office Supreme Court U. S.
FILED
OCT 5 1906
JAMES H. McKENNEY,
Clerk.

COUNTY COMMISSIONERS OF WICOMICO COUNTY

vs.

SAMUEL BANCROFT, JR.

Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

Brief for Respondent, Samuel Bancroft, Jr.

NICHOLAS P. BOND,
RALPH ROBINSON,
EDWARD DUFFY,
Attorneys for Respondent.

IN THE

Supreme Court of the United States.

COUNTY COMMISSIONERS OF WICOMICO COUNTY

vs.

SAMUEL BANCROFT, JR.

Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT.

STATEMENT OF FACTS.

The respondent, Samuel Bancroft, Jr., filed his bill of equity in the Circuit Court of the United States for the District of Maryland, seeking to enjoin the petitioners from levying taxes on the mortgaged property of the Baltimore, Chesapeake and Atlantic Railway Company, represented by the bonds, whereof the respondent is the holder of twenty, having the par value of $1,000 each, and from enforcing the payment of taxes by the sale of the property. A demurrer to the bill was filed in behalf of the petitioners, the respondents below. This demurrer was overruled in an opinion filed by the Circuit Court Judge. (Record, page 16.) Afterward, upon a hearing of the case upon its merits, a decree was signed by the Circuit Court Judge

declaring a part of the property of the Baltimore, Chesapeake and Atlantic Railway Company to be exempt from taxation at the hands of the petitioners, the respondents below. (Record, page 123.) Thereupon cross-appeals were filed in the United States Circuit Court of Appeals for the Fourth Circuit, which Court affirmed the decision of the Circuit Court, the case being reported in 135 Fed. Rep., page 977. The case is now brought to this Court by a writ of *certiorari* granted at the instance of the petitioners.

It appears from the admitted facts in the case (Record, page 26, *et seq.*) that the Baltimore and Eastern Shore Railroad Company, a corporation formed to build a line of road from Eastern Bay, in Talbot county, to the town of Salisbury, in Wicomico county, obtained from the Legislature of Maryland an Act enlarging its powers and granting it certain privileges and immunities. This Act forms chapter 133 of the Acts of Assembly of 1886, and the sections of the Act more particularly pertinent to the issues in this case, are sections Nos. 2, 4 and 5, which read as follows:

"Section 2. *And be it enacted*, That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all State, county or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the *termini* mentioned in its charter.

"Section 4. *And be it enacted*, That the said Baltimore and Eastern Shore Railroad Company aforesaid shall have power to unite, connect and consolidate with any railroad company or companies, either in or out of this State, so that the capital stock of said companies so united, connected and consolidated (respectively), may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them

possess, have and enjoy under and by virtue of their respective charters.

"Section 5. *And be it enacted,* That the Baltimore and Eastearn Shore Railroad Company shall have power to lease or purchase and operate any railroad or railroads, either in or out of this State, for the purpose of carrying on their business, and any other railroad company in this State shall have the right to lease or sell its railroad or other property to the said Baltimore and Eastern Shore Railroad Company."

The Baltimore and Eastern Shore Railroad Company, having duly accepted the provisions of the Act, proceeded to construct its road between the termini mentioned in its charter, which construction it completed in August, 1891. In June, 1890, it purchased all the property of the Wicomico and Pocomoke Railroad Company, which was duly conveyed to it by deed (Record, page 28). The Wicomico and Pocomoke Railroad consisted of a line about thirty miles long, extending from Salisbury to Ocean City, and with the road built by the Baltimore and Eastern Shore, constituted a line about ninety miles long from Eastern Bay, to the Atlantic Ocean.

After the Baltimore and Eastern Shore had acquired the Wicomico and Pocomoke, it proceeded to mortgage the whole of its property to secure an issue of $1,600,000, par value, of mortgage bonds. (Record, page 29.)

This mortgage (Record, page 53) describes the property conveyed as being "all and singular the entire line of railroad of the party of the first part (the Baltimore and Eastern Shore R. R.), situate, lying and being in the State of Maryland, between Broad Cove, Eastern Bay, Talbot County, and Salisbury, in Worcester (*sic*) county, and extending from said termini through the counties of Talbot, Caroline, Dorchester and Wicomico, in said State, and also all the line of railroad between Salisbury, Wicomico county, and Hammock Point, in Worcester county, in said State, which last mentioned railroad comprised

the railroad of the Wicomico and Pocomoke Railroad Company, an entire distance of about ninety miles " and also steamboats, docks, piers, rolling stock, etc., etc. ; and the rights, privileges, franchises, immunities and exemptions, including the " immunity and exemption from taxation granted to, conferred and bestowed on the party of the first part." (Record, page 69.)

It further appears (Record, page 35) that in 1894, the above mortgage was foreclosed by decree of the Circuit Court of the United States for the District of Maryland, and that the purchaser of all of the above described mortgage property at the foreclosure sale proceeded to organize a corporation under the name of the Baltimore, Chesapeake and Atlantic Railway Company, under the provisions of sections 187, 188 and 189, of article 23 of the Code of Maryland, 1888, (being sections 275 *et seq.* Code 1904.((Record, page 70.)

These sections provide as follows :

Section 187 provides that in case of the sale of any railroad under foreclosure of mortgage, the purchaser may form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors, etc., etc.

" Section 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same which were possessed and enjoyed by the corporation which owned or held such railroad previous to such sale under or by virtue of its charter, and any amendments thereto, and of any other laws of this State."

Section 189 provides that such corporation may mortgage its property, immunities and franchises.

It also appears (Record, pages 29 and 30) that the respondent is the holder of mortgage bonds, issued by the Baltimore, Chesapeake and Atlantic Railway Company, secured by a deed

of trust conveying to the Atlantic Trust Company, as trustee, the property formerly belonging to the Baltimore and Eastern Shore Railroad Company, and other property subsequently acquired by the Baltimore, Chesapeake and Atlantic Railway Company.

That the petitioners are the County Commissioners of Wicomico county, and have levied and assessed taxes upon all of said property, and threaten to sell the same for non-payment of the taxes. (Record, page 31.)

That the Atlantic Trust Company is a citizen and resident of the State of New York, and declines to take proceedings unless demand be made upon it by a majority of the bondholders, which demand the respondent has no means of procuring. (Record, page 33.)

The property in Wicomico county covered by the mortgage to secure the bonds owned by the respondent may be divided into three classes:

Class (A). Property formerly belonging to the Baltimore and Eastern Shore Railroad Company, and forming a part of the line built by it under its charter power to construct a road between Eastern Bay and Salisbury.

Class (B). Property formerly owned by the Baltimore and Eastern Shore Railroad Company and acquired by it under its purchase of the Wicomico and Pocomoke property.

Class (C). Property at no time owned by the Baltimore and Eastern Shore Railroad Company but acquired by the Baltimore, Chesapeake and Atlantic Railroad Company subsequent to its organization.

This last class consists mainly of steamboats and wharf property.

It also appears that in two cases, one, The Baltimore, Chesapeake and Atlantic Railway Company vs. the Mayor and City Council of Ocean City, and the other, The Baltimore, Chesapeake and Atlantic Railway Company vs. The County Commis-

sioners of Wicomico County, the Court of Appeals of Maryland decided that the property of the Railroad Company was not exempt from taxation. The respondent, however, was not a party to either of said suits, nor was any other bondholder, nor was the trustee under the mortgage. (Reported respectively 89 Md. 89, and 93 Md. 103.)

I.

Argument Upon the Demurrer.

The bill discloses a cause of action within the jurisdiction of the Circuit Court of the United States, in which it was filed, because

First. OF DIVERSE CITIZENSHIP AND AMOUNT IN CONTROVERSY.

Gaines vs. Fuentes, 92 U. S. 10-18.

Second. RESPONDENT WAS NOT A PARTY TO THE PROCEEDINGS REPORTED IN 89 MD. 89, AND IN 93 MD. 113, AND IS, THEREFORE, NOT ESTOPPED BY THE DECISIONS IN THOSE CASES.

It is well settled that a mortgagee is not bound by any proceedings against his mortgagor, which are not begun until after the execution of the mortgage unless he was made a party thereto.

Black, Judg., sec. 551.
Keokuk and W. R. R. vs. Missouri, 151 U. S. 301, 313, 314.
Campbell vs. Hall, 16 N. Y. 575.
Carroll vs. Goldschmidt, 83 Fed. Rep. 510.

Of the suits in the Maryland Court, one (89 Md., page 89) was one between the Baltimore, Chesapeake and Atlantic Railway Company, the mortgagor, and the Mayor and City Council of Ocean City. The other was between the mortgagor and petitioners.

The respondent, Bancroft, is the holder of twenty of the bonds, each of the face value of $1,000, issued pursuant to a

mortgage made by the Baltimore, Chesapeake and Atlantic Railway to the Atlantic Trust Company of New York long before the institution and decision of these case. If the mortgagee, the Atlantic Trust Company, who has only a naked interest in the property as mortgagee, is not bound by the decision in this case, *a fortiori* a holder of a part of the mortgage debt, the real, although not the technical mortgagee, is not bound.

Third. THE INTEREST OF THE RESPONDENT, BANCROFT, IS OF SUCH A CHARACTER AS TO ENTITLE HIM UNDER THE ALLEGATIONS OF THE BILL TO BE HEARD.

It is settled that, under the allegations made in the bill, a trustee could maintain an action.

The Baltimore Trust and Guarantee Company vs. The City of Baltimore, 64 Fed. Rep. 153.
S. C., 166 U. S. 573.

A stockholder could file such a bill.

Barnes vs. Koenegy, 62 Fed. Rep. 671.
Chicago vs. Sheldon, 9 Wall. 50.

And so likewise can a bondholder.

Thus, in a case strongly analagous:

> The mortgage bondholders of certain railroads in Texas, brought bills against the railroad companies and against the State Railroad Commissioners, and the Attorney-General alleging that full interest on the bonds was not being paid or earned by the railroads, because of the ruinously low rates established by the said commission upon which the companies were required to do business.

Held:

> That the complainants, the bondholders, showed an equitable interest in the fair earnings of the road; they show actual ownership and possession of the mortgage

securities of the roads, both of which they allege are being irreparably injured and threatened with destruction by the defendants; and that they could maintain the suit.

Mercantile Trust and Deposit Company vs. Texas and Pacific Railway Company, 51 Federal Rep. 529, 536.

Fourth. BECAUSE THE FEDERAL COURT IS NOT BOUND TO FOLLOW THE DECISIONS OF THE COURT OF APPEALS OF MARYLAND IN CONSTRUING THE MARYLAND STATUTES.

It is admitted that the original mortgage of the Baltimore and Eastern Shore Railroad, which was afterwards foreclosed, was executed and foreclosed long prior to the decisions rendered by Court of Appeals of Maryland. (Record, page 45.)

That the Baltimore, Chesapeake and Atlantic Railway was formed by the purchaser under the provisions of sections 187, 188 and 189 of article 23 of the Code of Maryland, 1888, (being sections 275, *et seq.*, Code 1904,) and the bonds owned by the respondent, were issued and secured by the mortgage dated September 1, 1894, *and had been acquired by the respondent in 1896, long prior to such decisions.* (Record, page 30.)

In other words, that the organization of the Baltimore, Chesapeake and Atlantic Railway Company, and the contracts between the railway and its bondholders had been entered into, and the rights of the bondholders thereon and arising therefrom, had accrued at a time when the decisions in question had not been made.

It is, we submit, the right of a complainant under this state of facts to have the independent judgment of this Court upon his rights. It is to that very end that the Courts of the United States are given authority to administer the laws of the State in controversies between citizens of different States.

The Mercantile Trust and Deposit Co. vs. Texas and Pacific Rwy., 51 Fed. Rep. 536.

We fully admit the doctrine that where a State statute has been construed, or a rule of property established *at the time a transaction is entered into*, or rights accrued, such construction, or rule, will bind the parties as fully as though written into the transaction; but where no such construction was then in force, we are entitled to have this statute construed by the independent judgment of this Court.

This point seems to us to be clear on the authority of the following cases:

Burgess vs. Seligman, 107 U. S. 20.
Carroll Co. vs. Smith, 111 U. S. 556.
Anderson vs. Santa Anna, 116 U. S. 356.

Burgess vs. Seligman is, perhaps, the leading case on this subject.

This was a case where the question arose over a State statute fixing the liability of the holders of stock.

The Supreme Court of Missouri had construed the identical statute, under consideration by the Supreme Court. The Supreme Court declined to follow the State Court's decision, and summarized the rule thus (page 33):

> "When contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision of State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State Courts after such rights have accrued."

In Carroll Co. vs. Smith, the Supreme Court again declined to follow the decision of the Supreme Court of Mississippi, construing a State statute, saying (page 562):

> "It is a decision upon the very bonds here in suit, pronounced after the controversy arose, and between other

parties. It was not a rule previously established, so as to have become recognized as settled law, and of which, of course, all parties to transactions afterwards entered into would be presumed to know and to conform to. When, therefore, it is presented for application by the Courts of the United States, in a litigation growing out of the same facts, of which they have jurisdiction by reason of the citizenship of the parties, the plaintiff has a right under the Constitution of the United States, to the independent judgment of those Courts to determine for themselves what is the law of the State by which his rights are fixed and governed. It was to that very end that the Constitution granted to citizens of one State suing in another, the choice of resorting to a Federal tribunal."

In Anderson vs. Santa Anna, the Court cite with approval Burgess vs. Seligman, and say, (page 362):

"When rights have accrued, before the State Court has announced its construction, the Federal Courts, although leaning to an agreement with the State Court, must determine the question upon their own independent judgment * * * we cannot depart from the long established doctrine which makes it our duty to determine the rights of parties, where those rights depend upon the local law, according to that law as judicially declared at the time such rights accrued, or in the absence of any such declaration, according to the law, as in our judgment, it then was."

We submit, therefore, on these authorities, that this respondent is entitled to have his rights determined according to the law as it existed on September 1, 1894, at which time the rights of bondholders accrued.

Louisville Trust Co. vs. City of Cincinnati, 76 Fed. Rep. 296.

THIS SUIT IS NOT IN VIOLATION OF THE REVISED STATUTES OF THE UNITED STATES, SECTION 720, FORBIDDING THE WRIT OF INJUNCTION BY ANY CIRCUIT COURT OF THE UNITED STATES TO STAY ANY PROCEEDINGS IN ANY COURT OF A STATE EXCEPT IN BANKRUPTCY.

The respondent does not ask that the petitioners be restrained from enforcing any judgment secured by them in any proceeding in a State Court. The taxes that the petitioners seek to collect from the property covered by the mortgage securing the respondent's bonds are those levied by the petitioners for the years 1900 and 1901 in the exercise of the powers conferred upon them by Section 7 of Article 25 of the Public General Laws of Maryland 1888 and 1904; or else by virtue of section 192 of Chapter 120 of the Acts of 1896. (See the Record, Prayer for Relief, page 12, and Agreed Statement of Facts, p. 31.)

The powers and duties of County Commissioners in Maryland are defined by Article 25 of the Code of Public General Laws (1888 and 1904) in compliance with Article 7 of the State Constitution, and additional methods provided for enforcing the payment of taxes are to be found in Article 81, Sections 26 and following. (Code 1888 and 1904.)

The methods of enforcing the payment of taxes established and recognized by the laws of Maryland are briefly as follows:

(*a*) By execution directly against the specific property.

The County Commissioners appoint Collectors. (Article 81, Section 31 of the Public General Laws of Maryland, 1888 and 1904.)

Upon failure to pay the taxes within the time prescribed by law it is made the duty of such collectors to proceed by distress or execution to sell the specific property in question.

Article 81, Section 49, Code 1888 (being sections 50 *et seq.*, Code 1904).

These duties are in their nature purely ministerial and do not in any sense constitute "a proceeding in a State Court," and, hence, the Federal Statute does not apply.

Weil vs. Calhoun, 25 Fed. Rep. 865.

The County Commissioners of Wicomico County are not a Court within the meaning of the Federal Statute. They are nowhere by any section of Article 25 clothed with judicial powers. There is no reference to them in Article 4 of the State Constitution, which deals with the Judiciary Department of the State Government.

(b) The County Commissioners may proceed to collect the amount of the taxes by an action of debt or other proceeding in a State Court.

Dugan vs. The Mayor and City Council of Baltimore, 1 G and J. 499.

The Federal Statute, however, is not directed at such a contingency, because it is well established that where the Federal Court has, as in the case at bar, first obtained jurisdiction, the Statute does not apply.

Railroad Company vs. Kuteman, 4 Circuit Court of Appeals, 506.

President, etc., vs. Merritt, 59 Fed. Rep. 6; and see a valuable note on the interpretation of Section 720 of the Federal Statutes appended to Garner vs. Second National Bank, in 16 Circuit Court of Appeals, page 90.

THIS SUIT IS NOT IN VIOLATION OF THE ELEVENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, FORBIDDING SUITS AGAINST THE STATE.

The eleventh amendment of the Constitution of the United States is not applicable to the case at bar, for whilst the amendment provides that no suit shall be commenced or prosecuted against the State, the prohibition is inapplicable if the State is not necessarily a defendent, notwithstanding the fact that the State's interest may be incidentally affected.

Accordingly, it has been held that where counties are under a State Constitution suable as municipal corporations, the Federal Courts have jurisdiction of suits against them.

See Lincoln County vs. Luning 133 U. S., and the following language of the Court through Justice Brewer, page 899:

"It was said by Chief Justice Marshall, in Osborne vs. Bank of the United States, 9 Wheaton, 733-857, that the Eleventh Amendment, which prevents the jurisdiction granted by the Constitution over suits against States is of necessity limited to those suits in which the State is a party of record.

"Whilst that statement was held by this Court in the case of Ayres, 123 U. S. 433, to be too narrow, yet by that decision the jurisdiction was limited only in respect to those cases in which the State is the real, if not the nominal, defendant; and while the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State.

"In this respect it is a part of the State only in that remote sense in which any city, town or other municipal corporation may be said to be a part of the State."

The powers and duties of County Commissioners are defined by sections 1 and 2 of Article 25 of Public General Laws of Maryland, hereinbefore referred to. They are declared to be a corporation, and by Article 4 it is provided that they may sue and be sued; by Article 7 it is provided that they shall levy all needful taxes on the assessable property within the County liable to taxation and provide for collecting the same, etc. They represent the county, and litigation for and in behalf of the counties, as well as that against them, is conducted in their name.

County Commissioners of Howard County vs. County Commissioners of Frederick County, 20 Md. 432.

Eyler vs. County Commissioners of Allegany County, 49 Md. 257.

It is submitted, therefore, that the suit at bar is brought directly within the doctrine of—

Lincoln County vs. Luning, cited above.

II.

Argument Upon The Merits.

PART 1.

The fact relied upon by the respondent to support the claim that the property represented by the bonds is exempt from taxation, is—

THAT THE EXEMPTION GRANTED THE BALTIMORE AND EASTERN SHORE RAILROAD COMPANY FOR A PERIOD OF THIRTY YEARS FROM THE DATE OF COMPLETION, AUGUST, 1891, OF SAID ROAD BETWEEN THE TERMINI, CLAIBORNE AND SALISBURY, BY CHAPTER 133 OF THE ACTS OF 1886, WAS TRANSFERRED TO THE BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY WHEN THAT COMPANY WAS ORGANIZED UNDER SECTIONS 187, 188 AND 189 OF ARTICLE 23 OF THE MARYLAND CODE OF PUBLIC GENERAL LAWS OF 1888, BEING SECTION 275 AND FOLLOWING OF THE CODE OF 1904, TO ACQUIRE PROPERTY WHICH HAD BEEN FORECLOSED UNDER THE BALTIMORE AND EASTERN SHORE RAILROAD'S MORTGAGE TO THE ATLANTC TRUST COMPANY.

Section 187 provides that in case of foreclosure the purchaser (in this case, N. P. Bond), may form a corporation (in this instance The B., C. & A. Ry. Co.,) for the purpose of owning and possessing, maintaining and operating such railroad by filing in the office of the Secretary of State a certificate, etc.

Section 188 provides such corporation so formed, shall possess all the powers, rights, *immunities*, privileges and franchises in respect to such railroad or part thereof, included in such certificate, and in respect to the real and personal property appertaining to the same which were possessed or enjoyed by the corporation which owned or held such railroad previous to such sale, under or by virtue of its charter, and any amendments thereto and of any other laws of the State.

Now, it is respectfully submitted that the employment of the language, "powers, rights, *immunities*, privileges and franchises" in section 188 of the Code of Public General Laws of Maryland, is not only broad enough to transfer the exemption from taxation secured to the original railroad by section 2 of the Acts of 1886; but that is the *very* language which has been held *apt* and *technical* for this purpose by a line of decisions in both the Federal and State Courts, unbroken with the single exception of the case in 89 Md., page 89.

> Thus: The St. Louis and Iron Mountain Railroad was sold to satisfy certain liens, and was bought in by the State of Missouri. Subsequently, it was sold by the State to certain persons pursuant to an Act of the Legislature, which provided that the purchasers of the road should have the rights, franchises, privileges and *immunities* which were enjoyed by the original company.

Held, that this language would transfer to the purchasers an exemption from taxation enjoyed by the original company.

Trask vs. Maguire (1873), 18 Wallace, 391-405.

> By Act of the Legislature, the Pensacola Railroad was authorized to acquire from the Pensacola and Louisville Railroad Company, by purchase and assignment, all the property, rights, franchises, privileges and *immunities* of the Pensacola and Louisville Railroad Company.

Held, that this carried an exemption from taxation enjoyed by the Pensacola and Louisville Railroad Company.

L. & N. R. R. Co. vs. Palmes (1883), 109 U. S. 251.

> The Bluff City Insurance Company was incorporated by the Legislature of Tennessee, and certain immunities from taxation was secured to it. Subsequently, the DeSoto Insurance Company was incorporated; and all the rights, privileges and immunities of the Bluff City Insurance

Company were granted the DeSoto Company. Afterward the Washington Fire and Marine Insurance Company was incorporated; and to it was granted all the rights and privileges (omitting the word "immunities") of the DeSoto Company. The Supreme Court says (page 177): In granting to the DeSoto Company all the rights, privileges and immunities of the Bluff City Company all words were used which could be regarded as necessary to carry the exemption from taxation possessed by the Bluff City Company; while in the next following grant, that of the plaintiff in law (The Washington Company), the word "immunities" is omitted.

Held, that the omission of the word "immunity" disclosed an intention on the part of the Legislature to deny the exemption to the new company.

Phoenix Insurance Company vs. Tennessee (1895), 161 U. S. 174.

To the same effect are the State decisions.

The Morris and Essex Railroad Company leased all its property, franchises, *immunities*, rights, powers and privileges to the Delaware, Lackawanna and Western Railroad Company. A subsequent Act of the Legislature of New Jersey validated and confirmed the lease and authorized the D. L. & W. R. R. Co. to have power to use, enjoy, possess and exercise all and singular the property, things, franchises, *immunities*, rights, powers and privileges of the Morris and Essex Railroad Company.

Held, that this transferred the immunity from taxation enjoyed by the Morris and Essex Railroad Company.

State Board of Assessors vs. Morris and Essex R. R. Co., 49 N. J. 193-211.

The terms of decree of sale to a Railroad Company provided that the purchaser should be vested with all the

rights, privileges and *immunities* appertaining to the franchise so called, and under the Act incorporating the Company and amendments thereto.

Held, that this transferred to the purchaser the immunity from taxation enjoyed by the corporation sold.

State vs. Railroad, 80 Tenn., pages 583-594.

That the word "immunity" is apt to convey an exemption from taxation, see also—

Memphis vs. Phoenix Insurance Company, 91 Tenn., pages 566-571.

If we come to the Maryland case, the only dissent to this familiar doctrine, an examination will disclose that no attempt is made to reconcile the decision in that case with the authorities above cited. They are not given even the courtesy of passing notice. The only reference to sections 187 and 188 of the Maryland Code is found in the four lines at the bottom of page 98.

The learned Court cites—

The Chesapeake and Ohio Railroad Company vs. Miller, 114 U. S. 186, and

Picard vs. Tennessee Railway Company, 130 U. S. 641.

Wilson vs. Gaines, 103 U. S. 417.

Morgan vs. Louisiana, 93 U. S. 217.

All of these are authorities upon the following proposition: That a grant of "*all the powers and privileges*," or all the "*rights, powers and privileges*" will not carry an exemption from taxation.

This doctrine, on the authority of these cases, appears to be now well established. We are dealing, however, with a grant in terms much broader than these; a grant of "all the powers, rights, *immunities*, privileges and franchises."

It is equally well established that the use of the word "*immunities*" is the apt term to cover an exemption from taxation such as was secured to the original company by Section 24, of Chapter 133, of the Acts of 1886.

At the time of the incorporation of the Baltimore, Chesapeake and Atlantic Railway Company, viz., in 1894, there was an unbroken line of decisions in the Federal and State Courts that the employment of the word "immunities" conveyed an exemption from taxation; and those interested in this project as to capitalization, had a right to read into their charter the additional and very material value which this exception added to the charter. Every purchaser of bonds and stock had a right to rely upon it in determining the security for the bonds and the prospects of the company.

Can it be that a suitor in this Court entitled to apply to it for justice by reason of citizenship in another State, whose right accrued at a time, *i. e.*, in the year 1896, when he purchased the said bonds, and when the Supreme Court's decisions were his only guide as to the legal effect of the statute, is to be turned from the doors of this Court on the ground that this Court cannot determine the justice of his claim, because it is concluded by the Maryland decision, rendered in a case to which the suitor in this Court was neither a party nor a privy?

PART 2.

HAS THE EXEMPTION THUS SECURED TO THE BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY BEEN REPEALED?

It is contended in behalf of the Petitioners that it may be conceded *gratia arguendi* that Sections 187 *et seq.* Maryland Code, 1888, (being Sections 275 and following of the Maryland Code, Edition 1904), conferred the immunity from taxation granted the Baltimore and Eastern Shore Railroad Company by the Acts of 1886, Chapter 133, upon the Baltimore, Chesapeake and Atlantic Railway Company, because the general assessment law of 1896, Chapter 120, of the Acts of Assembly

of Maryland, by its provisions repeals the Act of 1886, Chapter 133.

This necessitates an examination of the Act of 1896, Chapter 120, in its relation to the Act of 1886, Chapter 133.

Chapter 120 of the Acts of 1896 discloses no references in express terms to the Act of 1886, Chapter 133, or to the Baltimore and Eastern Shore Railroad Company, or to its successor, the Baltimore, Chesapeake and Atlantic Railway Company, nor does it contain any provision repealing the exemptions conferred by special Acts prior in date thereto, so that at the outset the Petitioners are confronted with the task of satisfying the Court that the *general* law, known as the "Assessment Law, 1896, Chapter 120," repealed *by implication* the *special* law of 1886, Chapter 133, which conferred immunity from taxation upon the Baltimore and Eastern Shore Railroad Company, which in turn was secured to the Baltimore, Chesapeake and Atlantic Railway Company by Sections 187 and following of the Code of 1888 (being Sections 275 and following of the Code of 1904.)

If the title of Chapter 120 of 1896 is examined it will be found to be an Act *repealing and re-enacting with amendments certain sections of Article 81 of the Code of Public General Laws* (Code of 1888), entitled "Revenue and Taxes," and adding certain new sections thereto. The sections thus repealed and re-enacted with amendments are Sections 1, 2, 4 and 141 and 146.

It is essentially an amendatory Act.

In order to determine the changes made in these sections by Chapter 120 of the Acts of 1896, it will be necessary to compare these sections as they stand in the Code of Public General Laws, known as Code of 1888, with the sections as re-enacted with amendments by Chapter 120 of the Acts of 1896.

Section 1 of Article 81 of the Code of Public General Laws, being the Code of 1888, provides :

"All State and county taxes, and all taxes in the City of Baltimore, shall be levied upon the assessment heretofore made, and such further assessments as may hereafter be made agreeably to law, unless otherwise directed in the Act of Assembly levying said taxes."

Section 1 of Chapter 120 of the Acts of 1896, as repealed and re-enacted, with amendments, provides :

"All State and county taxes and all municipal taxes shall be levied upon the assessments made in conformity to the provisions of this article, and in conformity with all laws relating to revenue and taxes and not embraced in this article."

The concluding language of this Section as amended is significant. It does not provide that all Acts or parts of Acts inconsistent with the provisions of this article are repealed, but specifically recognizes the validity of all those laws relating to revenue and taxes which are not embraced in the article.

It must be borne in mind that at the time this law was passed the appellee was exercising its franchise under the claim of exemption secured to the Baltimore and Eastern Shore Railroad Company by Chapter 133 of the Acts of 1886 and had been doing so continuously since its formation in 1894.

It is submitted that it would be difficult to frame language, short of explicit reference thereto, better calculated than this to express an intention that the provisions of the Act of 1886, chapter 133, were *not* to be repealed.

Section 2 of Article 81 of the Code of Public General Laws, (1888), read as follows :

"All interest, shares or proportions owned by residents of this State in all ships or other vessels registered in a port of Maryland, whether such ships or other vessels be in or out of port, are and shall be subject to valuation and

assessment to the respective owners thereof in the county or city in this State in which such owners shall respectively reside; all real property in this State belonging to any bank incorporated under the laws of this State, or of any other State, or to any national bank located in this State, or to any company or corporation incorporated by or under the laws of this State, or of any other State, or under the laws of the United States, or of any territory, or to any joint stock company doing business in this State, is and shall be subject to valuation, assessment and levy of taxes thereon for State, county and municipal purposes by the county commissioners of the respective counties in which such real property is situated, or by the appeal tax court of Baltimore City, if such real property is located in said city, as the property of such bank, company corporation or joint stock company; and such bank, company, corporation or joint stock company shall pay the taxes thereon so assessed and levied. All shares in any joint stock company, and all shares of stock in any bank, incorporated under the laws of this State, or in any national bank located in this State, or in any incorporation incorporated under the laws of this State, other than railroad companies working their respective railroads by steam power, not exempted from taxation by irrepealable contract with this State, are and shall be subject to valuation and assessment to the owners thereof in the county or city in this State in which such owners may respectively reside, in the manner provided for by this Code; and the taxable values of such shares shall be ascertained and finally determined, and the taxes thereon levied and collected in each year, under the regulations hereinafter prescribed, or as the same may be hereafter provided by law; all shares of stock, or shares in any bank, other than a national bank, or in any company or corporation incorporated by or located in and doing business in any other State, or in any territory or country, owned by residents

of this State; all bonds, made or issued by any State, owned by residents of this State; all bonds made or issued by any territory or by any corporation, belonging to residents of this State; all investments in private securities of every kind and description, belonging to residents of this State; the real property located in this State, and the personal property owned by any corporation incorporated by this State, not having a capital divided into shares or having shares of capital stock which are wholly or in part exempted from taxation by this State, when the said real or personal property so owned by said corporation is not protected from taxation by the exemption of said shares of stock from taxation; and all other property of every kind, nature and description, within this State, shall be valued to the respective owners thereof in the manner prescribed by this Code, and shall be assessed and taxed as the property of such respective owners, according to such prescribed methods of valuation, except as provided in section 4 of this article."

This section, as repealed and re-enacted with amendments by Chapter 120 of the Acts of 1896, reads as follows:

"All interests, shares or proportions owned by residents of this State in all ships or other vessels, whether such ships or other vessels be in or out of port, are and shall be valued and assessed for the purpose of State, county and municipal taxation to the respective owners thereof in the county or city in the State in which said owner or owners shall respectively reside, and such respective owners shall pay the taxes thereon. All real properties in this State belonging to any bank incorporated under the laws of this State or of any other State or belonging to any national bank located in this State, or to any company or corporation incorporated by or under the laws of this State, or of any other State, or under the laws of the United States, or of any territory, or under the laws of the

United States relating to the District of Columbia, or belonging to any joint stock company doing business in this State, is and shall be valued and assessed for the purpose of State, county and municipal taxation as the property of such bank, company, corporation or joint stock company, and such bank, company, corporation or joint stock company shall pay such respective taxes thereon. All money belonging to residents of this State, which shall be the proceeds of the sale of stocks, bonds or other property disposed of for the purpose of evading and escaping taxation; all shares or interest in any joint stock company, and all shares of stock in any bank incorporated under the laws of this State, or any national bank located in this State, or in any corporation incorporated under the laws of the State, shall be valued and assessed for the purpose of State, county and municipal taxation, to the owners thereof in the county or city in this State in which said owners may, respectively, reside; the taxable value of such shares shall be ascertained and determined, and the taxes thereon levied and collected as is now or may be hereafter provided by law.

"All personal property in which any resident of this State has an equitable interest with the legal title to the same in some other person or corporotion who is a non-resident shall be valued and assessed for the purposes of State, county and municipal taxation to the equitable owner thereof in the county or city in which he, she or it resides, and such equitable owner or owners shall pay the taxes thereon.

"All shares of stock or shares in any bank other than a national bank, or in any company or corporation incorporated by or located in, and doing business in any other State or District of Columbia, or in any territory or foreign country owned by residents of this State, shall be valued and assessed for the purposes of State, county and munic-

ipal taxation, to the owners thereof in the county or city in which said owners may, respectively, reside. All bonds made or issued by any State or District of Columbia or territory or by any corporation whatsoever belonging to the residents of this State, all investments in private securities of every kind and description belonging to residents of this State, the real property located in this State, and the personal property owned by any corporation incorporated by this State, not having a capital divided into shares, or having shares of capital stock which are wholly or in part exempted from taxation by this State when such real or personal property so owned by said corporation is not protected from taxation, by the exemption of said shares of stock from taxation, shall be valued and assessed for the purpose of State, county and municipal taxation to the owners thereof, in the county or city in which such owners may respectively reside; all certificates of indebtedness or evidences of debt in whatever form made or issued by any State, territory or by the District of Columbia, or by any public corporation or by any foreign country owned by residents of this State, shall be valued and assessed for State, county and municipal taxation to the owners thereof in the county or city of this State in which such owners may, respectively, reside.

"The property, real and personal, of each and every railroad company in this State, working its roads by steam power, shall be valued and assessed for county and municipal purposes, in the same manner as the property of individuals may be valued and assessed under this Act; provided, that no extra assessment shall be made, and no extra or special tax shall be levied or collected on any bridge over streams forming any part of the roadway of any railroad or turnpike company in this State, it being the meaning and intent of this Act, that any bridge over streams forming a portion of the roadway of any of said

railroads and turnpike shall be valued at the same rate that any other equal portion of said road is valued; and provided further, that all tunnels or subways forming a part of the roadways or subways of any railroad or turnpike company or other corporation shall be valued at their actual worth, as other property in this State is required to be valued under the provisions of this Act; and the provisions of section 155 of this article, in so far as the same are in conflict with the preceding provision of this section relating to tunnels, is hereby expressly repealed. The shares of capital stock of national banks located in this State, and of all other corporations incorporated under the laws of this State, shall be valued and assessed to the owners thereof residing in the city of Baltimore, and in the several counties of this State, at the same rate at which the same have been or shall be valued by the State Tax Commissioner for the year 1896; subsequent valuation of said stock shall be made in the manner now or hereafter provided by law; and it shall be the duty of the State Tax Commissioner to furnish the assessors in the city of Baltimore, and of the several counties, with a copy of the valuation so made of the shares of capital stock of each of such banks, and each and every of such corporations of this State for the year 1896; and the said assessors shall record in a separate book all valuations and assessments of all shares of stock of all corporations incorporated under the laws of this State, having a capital stock, whether the same be divided into shares or not, together with the names and residences of persons having an interest therein, the amount of such interest; and upon the completion of the assessment of all the taxable property in any county of this State, or any assessment district of Baltimore city, said book shall be delivered to the State Tax Commissioner for his information and guidance in the discharge of his official duties; and the valuation and assessment of said shares of stock shall not be returned

by the said assessors to the Boards of County Commissioners acting as Boards of Control and Review for the several counties and the Boards of Control and Review of Baltimore city. All bonds and certificates of indebtedness bearing interest, issued by any railroad or other corporation of this State, secured by mortgage of property wholly within this State, belonging to residents of this State, shall be subject to valuation, assessment and taxation to the owner or owners thereof, in the same manner as like bonds or certificates of indebtedness, bearing interest and secured by mortgage of property partly in this State and partly in some other State or States, are now subject to valuation and assessment under the laws of this State. All other property of every kind, nature and description within this State, except as provided by the fourth section of this article, shall be valued and assessed for the purpose of State, county and municipal taxation to the respective owners thereof in the manner prescribed by this article, provided, nothing contained in this section or Act shall repeal, modify or affect Sections 86 and 86 'A' of this article relating to the taxation of savings banks or the Act of 1892, Chapter 704, relating to the taxation of distilled spirits."

There are several significant changes made in the amended section, to which attention is directed.

Thus it will be observed that the following language of Section 2 of the Code, namely:

"All shares in any joint stock company and all shares in any bank incorporated under the laws of this State, or any national bank located in this State, or in any corporation incorporated under the laws of this State other than railroad companies working their respective railroads by steam power not exempt from taxation by irrepealable contract with this State, are and shall be subject to valuation and assessment to the owners thereof, etc."

Is changed in the amended section so as to read as follows:

> "All shares or interest in any joint stock company, and all shares of stock in any bank incorporated under the laws of this State, or any national bank located in this State, or in any corporation incorporated under the laws of this State valued and assessed for the purposes of State, County or Municipal taxation, to the owners thereof in the County or City in this State in which said owners may respectively reside, etc."

It will be noted that the language "other than railroad companies working their respective railroads by steam power not exempt from taxation by irrepealable contract with this State" is not to be found in the amended section, and it is submitted that the failure to use this language in the amended section is a distinct recognition on the part of the Legislature of the existence and continued validity of repealable concessions, bounties and contracts enjoyed by certain railroad corporations which could not be conceded to be irrepealable contracts.

The paragraph beginning "The property, real and personal, of each and every railroad company in this State, working its road by steam power, shall be valued and assessed for county and municipal purposes in the same manner as the property of individuals may be valued and assessed, etc.," is not to be found in Section 2 of the Code of Public General Laws, but is to be found almost word for word in Section 155 of Article 81, which section, indeed, an attempt is made to repeal in so far as the same is in conflict with the language employed by the amended and re-enacted section.

Now, this part of Section 2, Chapter 120, of the Acts of 1886, is relied upon by the petitioners to show a clear intention on the part of the Legislature to repeal the exemption conferred by the Act of 1886, Chapter 133.

It is submitted, however, that the petitioners cannot rely upon this language as an expression of intention on the part of the

Legislature to repeal the Special Act of 1886, for the following reasons:

(1st.) Because this language is no broader than that to be found in Section 155 of Article 81, which was in force at the time the exemption secured by Chapter 133 of the Acts of 1886 was granted the Baltimore and Eastern Shore Railroad Company, and in so far as it can be held to imply a repeal of this exemption, is copied word for word from Section 155.

(2d.) Because this part of Section 2 of Chapter 120 of the Acts of 1896 is unconstitutional, being an attempt to incorporate into an amendment of Section 2 a distinct section of Article 81, which is not named in the title of the Act.

Constitution of Md., Article III, Section 29.
Davis vs. State, 7 Md. 151-158.
Stiepel vs. Md. Inst. for Blind, 61 Md. 144-147.

When the sections to be amended are *specified*, matter cannot be introduced by way of amendment to such sections, which is provided for elsewhere in the Act.

Thus an Act to amend Sections 10, 12 and 14 of an Act in regard to licensing occupations, brought into these sections by amendment licenses for the business of refining sugar and molasses, which was provided for in Section 11 of the original Act. It was held to be void, as not within the title of the Act.

State vs. Amer. Sugar Ref. Co., 106 La. 553, 564.
Southerland Stat. Constr. (2d Edition), page 239.

As well might it be contended, that it effected an amendment of Article 23 of the Code, Section 204, which would indeed appear to be claimed (See Code 1904, Article 23, Sec. 293.)

Coming now to Section 4 of Article 81 of the Code of Public General Laws, we find it reads as follows:

> "The provisions of section 2 and 3 of this article shall not apply to any bonds, stock or evidence of debt issued by the United States, or to any property belonging to the

United States, or to this State, or to any county, or incorporated city or town in this State, nor to houses or buildings used exclusively for public worship, or to the furniture contained therein, or to the parsonages connected therewith, or to the grounds appurtenant to such houses, or to buildings so exclusively used for public worship, or as parsonages which are necessary for the respective uses thereof; nor shall the provisions of said sections apply to graveyards, cemeteries or cemetery companies which do not accumulate profits for any purpose except the maintenance or improvement of such cemeteries or graveyards as cemeteries or graveyards; nor to burying grounds set apart for the use of any family, or belonging to any church or congregation, or to the crop or produce of any land in this State in the hands of the producer or his agent; or to the provisions kept for the use and consumption of the family of the person to whom the same shall belong; or to the working tools of mechanics and manufacturers, moved or worked exclusively by hand; or to wearing apparel of any description; or to fish while in the possession of the fishermen employed in catching, salting and packing the same, or while in the possession of their agents unsold; or to the buildings, equipment and furniture of hospitals, asylums, charitable or benevolent institutions, or to the ground appurtenant thereto, in any city or incorporated town in this State, which is necessary for the respective uses thereof; nor to the buildings, equipment and furniture of hospitals, asylums, charitable or benevolent institutions, in any county of this State, but not within any city or incorporated town in this State, nor to the ground, not exceeding forty acres, appurtenant respectively thereto, which is necessary for the respective uses thereof; nor to the buildings, furniture, equipment or libraries of incorporated educational or literary institutions, or to the ground appurtenant thereto, in

any city or incorporated town in this State, which is necessary for the respective uses thereof; nor to the buildings, furniture, equipment or libraries of incorporated educational or literary institutions in any county of this State, but not within any city or incorporated town in this State, nor to the ground, not exceeding forty acres, appurtenant respectively thereto, which is necessary for the respective uses thereof; nor to the property, real or personal, of any corporation incorporated by this State, and having a capital stock divided into shares, when said shares only are subject to taxation under the laws of this State; nor to any shares of stock in any corporation, when said shares of stock are exempted by contract with this State from taxation under the laws thereof; nor to any property of any corporation whose shares of capital stock are exempted from taxation, when said property is protected from taxation by the exemption of said shares from taxation; nor to the shares of stock of railroad companies worked by steam, incorporated by or under the laws of this State, which are subject to State taxation upon their gross receipts within this State, and to county and municipal taxation upon their respective real and personal taxable properties in the respective counties and cities of this State in which such respective properties are located; nor to the value of such portions of the shares of homestead or building associations as may be represented by mortgages upon real or leasehold property within this State, when such real or leasehold estate so mortgaged is subject to taxation under the laws of this State; nor to such mortgages when the real or leasehold estate so mortgaged is subject to taxation under the laws of this State; nor to mortgages upon property wholly within this State; nor to the mortgage debts secured thereby; but each and every one of said exemptions from taxation shall be strictly construed."

This section, as repealed and re-enacted with amendments by Chapter 120 of the Acts of 1896, reads as follows:

"The provisions of this article shall not apply to any bonds or stocks or evidence of indebtedness, issued by the United States belonging to residents of this State, nor to any property in this State belonging to the United States or to this State, or to any county of this State, or incorporated city or town in this State, nor to houses or buildings used exclusively for public worship, nor to the furniture contained therein, nor to the parsonage connected therewith, nor to the grounds appurtenant to such houses, nor to buildings so exclusively used for public worship or as parsonages which are necessary for the respective uses thereof; nor shall the provisions of this article apply to graveyards, cemeteries or cemetery companies which do not accumulate profits for any purpose except for the maintenance or improvement of such cemeteries or graveyards as cemeteries or graveyards, nor to burying grounds set apart for the use of any family or belonging to any church or congregation, nor to crops or produce of any land in the hands of the producer or his agent, nor to provisions and fuel kept for the use and consumption of the family of the person to whom such provisions and fuel shall belong, nor to the working tools of mechanics or artisans, moved or worked exclusively by hand, nor to the first three hundred dollars in value of the farming implements of any farmer, nor to wearing apparel of any description, except diamonds and other costly jewelry not habitually worn on the person; nor to fish while in the possession of fishermen employed in catching, salting and packing the same, or while in possession of their agents unsold; nor to buildings, equipment and furniture of hospitals, asylums, charitable or benevolent institutions, or to the grounds appurtenant thereto, in any city or incorporated town of this State which is necessary to the respective uses thereof, nor to the buildings, equipments and furniture of hospitals, asylums, charitable

or benevolent institutions in any county of this State, but not within any city or incorporated town of this State, nor to the ground not exceeding forty acres appurtenant respectively thereto, which is necessary for the respective uses thereof, nor to the buildings, furniture, equipment or libraries of incorporated educational or literary institutions, or to the ground appurtenant thereto, in any city or incorporated town of this State which is necessary for the respective uses thereof; nor to the buildings, equipment or libraries of incorporated educational or literary institutions in any county of this State, nor to the ground, not exceeding forty acres, appurtenant respectively thereto, which is necessary for the respective uses thereof; nor to the personal property of any corporation incorporated by this State and having capital stock divided into shares, when said shares of said corporation are subject to taxation under the laws of this State, nor to the shares of stock of railroad companies working their roads by steam power, incorporated by or under the laws of this State, which are subject to taxation upon their gross receipts within this State, and to the county and municipal taxation upon their respective real and personal property in the respective counties and cities of this State, in which such respective properties are located, nor to the book accounts or bills receivable or evidences of debt given for such accounts of any person engaged in commercial business who is taxed upon a fair average value of his stock of goods, wares and merchandise; and every person engaged in commercial business shall be taxed upon the fair average value of his stock in such business during the year preceding the assessment upon which such tax is levied; and each and every one of said exemptions from taxation shall be strictly construed."

A comparison of these two sections will show no material change in the law relating to exemptions from taxation enjoyed

by the Railroad Companies. Both sections contemplate the existence in the State of railroads which do not pay any tax upon their gross receipts. Both sections contemplate railroad property in the State which is exempt from the payment of county and municipal taxes.

Coming next to section 146 of the Code of Public General Laws, we find it reads as follows:

> "A State tax of one-half of one per centum is hereby levied annually upon the gross receipts of all railroad companies worked by steam, incorporated by or under the authority of this State and doing business therein; and the said tax shall be due and payable at the treasury on or before the first day of March in each and every year."

Section 146 as repealed and re-enacted, reads as follows:

> "A State tax, as a franchise tax, is hereby levied annually upon the gross receipts of all railroad companies whose roads are worked by steam power incorporated by or under the authority of this State or any other State, territory, District of Columbia or foreign country and doing business in this State, such State tax being as follows, to wit:"

It will thus be seen that this language of Section 146, as amended, is no broader than Section 146 of the Code of Public General Laws, which was in force at the time the immunity from taxation was granted the Baltimore and Eastern Shore Railroad Company by Chapter 133 of the Acts of 1886, and *that part* of the Section 146 of Chapter 120 of the Acts of 1896, which upon any theory can be held to apply to the Baltimore, Chesapeake and Atlantic Railway Company, is taken *ipsissimis verbis* from Section 146 of the Code of 1888.

It will be found, therefore, that every one of the Sections of Chapter 120 of the Acts of 1896, which are relied upon by Petitioners to show an intention on the part of the Legislature to repeal by this *general* law the *special* law of Chapter 133 of

the Acts of 1886 are *merely copied without change from the law as it stood when Chapter 133 of the Acts of 1886 was passed, and are not considered by the well recognized rule of legislative construction as repealed and re-enacted, but to have been the law all along.*

When there is an express repeal from an existing statute and a re-enactment of it at the same time, or a repeal or re-enactment of a portion of it, the re-enactment neutralizes the repeal so far as the old law is continued in force. It operates without interruption where the re-enactment takes effect at the same time.

State vs. Baldwin, 45 Conn. 134-144.
United Hebrew Building Association vs. Benshimol, 130 Mass. 325-327.
Middleton vs. New Jersey, 26 N. J. Equity, 269-273.
Santa Cruz Rock Pavement Co. vs. Lyons, 133 Cal. 114, 116.
Matter of Estate of Perine, 136 N. Y. 347, 353.
State Trust Co. vs. Kansas City P. & G. R. Co., 115 Fed. Rep. 367, 372.
Ely vs. Holton, 15 N. Y. 595-598.
Fuller vs. U. S., 48 Fed. Rep. 654-655.
Mowe vs. Township of Kenockee, 75 Wis. 335.
Hancock vs. Dist. Treas. of Perry, 78 Iowa, 550, 555.
Southerland Stat. Constr. (2d Ed.), pages 443-445.

Hence, it is submitted, Chapter 120 of the Acts of 1896, in so far as it is a re-enactment of laws which were in force in 1886, when Chapter 133 was passed, does not qualify or modify Chapter 133 of the Acts of 1886.

This is a well-settled rule of Legislative Construction, and is said to be especially true if the intermediate law is *special* or

particular and the re-enactment law is a *general* law on the same subject.

State vs. Commissioners of Public Lands, 106 Wis. 584-586.
Olsen vs. Haretwen, 57 Fed. Rep. 846, 849.
Harrison vs. Board of Supervisors, 117 Mich. 215-217.
Hawes vs. Fliegler, 87 Minn. 319-322.
Bentley vs. Adams, 92 Wis. 386-392.
Southerland on Legislative Construction, pages 524 and 525 (Second Edition).

That a *general act* is not to be construed to *repeal a previous particular act* unless there is some express reference to the previous statute on the subject, or unless there is a necessary inconsistency in the two acts standing together is a rule of construction recognized and applied by this Court.

State vs. Stone, 17 Wallace 465.
Cass County vs. Gillette, 100 U. S. 585.
Ex parte Crow Dog, 109 U. S. 566.
U. S. vs. Rodgers, 185 U. S. 87 and 88.

To Recapitulate.

Chapter 120 of the Acts of 1896 did not repeal the provisions of Chapter 133 of the Acts of 1886, because

(1st.) Chapter 133 of the Acts of 1886 is a *special* law and Chapter 120 of the Acts of 1896 is a *general* law, containing no express reference to Chapter 133 of the Acts of 1886, or to the Baltimore and Eastern Shore Railroad, or to the Baltimore, Chesapeake and Atlantic Railway Company, or to a repeal of existing exemptions in general terms.

(2d.) Because Chapter 120 of the Acts of 1896 is a repeal and re-enactment of certain sections of Article 81 of the Code of Public General Laws of 1888, without material change, all of which were in full force at the time of the passage of Chapter

133 of the Acts of 1886. Or in other words, in so far as any of the provisions of Chapter 120 of the Acts of 1896 can be held to apply to the Baltimore, Chesapeake and Atlantic Railway Company, the same were in force at the time of the passage of Chapter 133 of the Acts of 1886, and, therefore, there can be no *necessary inconsistency* in the two Acts, viz.: Chapter 133 of the Acts of 1886 and Chapter 120 of the Acts of 1896, standing together.

PART 3.

IF THE IMMUNITY FROM TAXATION CONFERRED UPON THE BALTIMORE AND EASTERN SHORE RAILROAD COMPANY BY CHAPTER 133 OF THE ACTS OF 1886 WAS TRANSFERRED TO AND IS NOW ENJOYED BY THE BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY BY VIRTUE OF SECTION 187 ET SEQ., CODE 1888 (BEING SECTION 275 ET SEQ., CODE 1904), TO WHAT PROPERTY NOW OWNED BY THE BALTIMORE, CHESAPEAKE AND ATLANTIC RAILWAY COMPANY DOES THIS IMMUNITY EXTEND?

We have already seen that the property in Wicomico county covered by the mortgage to secure the bonds owned by the respondent may be divided into three classes:

Class A. The property formerly belonging to the Baltimore and Eastern Shore Railroad Company and forming a part of the line built by it under its charter power to construct a road between Eastern Bay and Salisbury.

Class B. The property formerly owned by the Baltimore and Eastern Shore Railroad Company and acquired by it under its purchase of the Wicomico and Pocomoke property.

Class C. Property at no time owned by the Baltimore and Eastern Shore Railroad Company, but acquired by the Baltimore, Chesapeake and Atlantic Railway Company subsequent to its organization. This last class consists mainly of steamboats and wharf property.

It was decided by the learned Judge of the Circuit Court of the United States for the District of Maryland that the immu-

nity from taxation secured to the Baltimore, Chesapeake and Atlantic Railway Company must be confined to Class A, and this opinion was affirmed by the learned Judge of the United States Circuit Court of Appeals.

It is submitted, however, that the exemption should include Class B. and Class C., as well as Class A.

The Record shows ("Agreed Statement of Facts," page 28) that Wicomico and Pocomoke Railroad extended from Salisbury at the Eastern terminus of the Baltimore and Eastern Shore Railroad to Ocean City on the Atlantic Coast, and that the Baltimore and Eastern Shore Railroad Company acquired by purchase in the year 1890, said Wicomico and Pocomoke Railroad and consolidated it with its own property. In doing so the Baltimore and Eastern Shore Railroad Company was acting well within the scope of its powers. Section 4, of its amended Charter, Chapter 133 of the Acts of 1886, Record, page 27, provides that it "shall have the power to unite, connect and consolidate with any railroad company or companies either in or out of the State, so that the capital stock of said companies so united, connected and consolidated, respectively, may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters."

Here again is employed the apt and technical term "*immunities.*" After the acquisition of the Wicomico and Pocomoke Railroad Company, it became a part of the Baltimore and Eastern Shore Railroad Company; together they thereafter constituted one company having a common stock, with one terminus in the east at Ocean City, the other in the west at Claiborne; and all the property, franchises, rights, privileges and *immunities* which the Baltimore and Eastern Shore Railroad Company enjoyed were conferred upon the Wicomico and Pocomoke Railroad Company; and reciprocally all the rights,

privileges and immunities which the Wicomico and Pocomoke Railroad Company enjoyed were conferred upon the Baltimore and Eastern Shore Railroad Company.

How can it be contended under the specific and technical language of this section of the amended charter that the exemption from taxation enjoyed by the Baltimore and Eastern Shore Railroad Company did not instantly extend to and affect the Wicomico and Pocomoke Railroad Company? That it did *eo instanti* so extend is supported alike by reason and upon authority.

L. and N. Railroad vs. Palmes, 109 U. S. 215.
Phoenix Insurance Co. vs. Memphis, 161 U. S. 174.
Board of Assessors vs. M. & E. R. R. Co., 49 N. J. L. 193.
State vs. Railroad, 80 Tenn. 583, and cases heretofore cited.

When the Baltimore and Eastern Shore Railroad Company was sold under foreclosure proceedings, the Wicomico and Pocomoke Railroad had become a constituent and practically indistinguishable part of the same, and passed to the purchaser as such; and if it be conceded that the exemption from taxation was conferred upon the successors of the Baltimore and Eastern Shore Railroad Company by sections 187, 188 and 189 of article 23 of the Public General Laws of Maryland, namely, the Baltimore, Chesapeake and Atlantic Railway Company, such exemption must extend to that part formerly known as the Wicomico and Pocomoke Railroad equally and as fully as to any other section or class of the company's road or property.

Exemption as to "Class C."

It was decided by the decree of the learned Court below that the exemption from taxation enjoyed by the Baltimore, Chesapeake and Atlantic Railway Company as successor to the Baltimore and Eastern Shore Railroad Company did not extend to

"Class C;" namely, that property at no time owned by the Baltimore and Eastern Shore Railroad, but acquired by the Baltimore, Chesapeake and Atlantic Railway Company subsequent to its organization, consisting mainly of steamboats and wharves.

It is difficult to understand upon what ground this contention can be supported.

The nature of the exemption enjoyed by the Baltimore, Chesapeake and Atlantic Railway Company can be determined only by powers, rights, immunities, privileges and franchises which were granted the Baltimore and Eastern Shore Railroad Company under its charter and amendments, and to which the Baltimore, Chesapeake and Atlantic Railway Company succeeded, by virtue of sections 187 and 188, etc., of Article 23 of the P. G. L. of Maryland (1888).

If reference be had to section 1 of Chapter 133 of the Acts of 1886 (Record, page 27), it will be found that the Baltimore and Eastern Shore Railroad Company had authority to—

> "Construct and operate branch roads, to lease, buy and improve lands for pleasure resorts along the line of their road, to lease, buy and build wharves, houses and shops for corporate purposes, to charter, purchase and hold steamboats and barges, to ply in connection with their railroad to any port or ports, place or places whatsoever, and to contract with the owners of any steamboat or other railway company for the transportation of freights and passengers to and from any such railroads or steamboats."

That said Act further provides as follows:

> Section 2. "That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all State, county or municipal taxation for the term of thirty years, accounting from the date of the completion of said road between the termini mentioned in its charter."

Can it be doubted that under these sections any steamboats or wharves belonging to the Baltimore and Eastern Shore Railroad Company, and acquired by it in the manner indicated by the statute, at any time during the life of the exemption were protected from taxation?

The exemption enjoyed by the Baltimore and Eastern Shore Railroad Company was transferred to the Baltimore, Chesapeake and Atlantic Railway Company, with full force and effect for the remainder of unexpired term of thirty years. The Baltimore, Chesapeake and Atlantic Railway stepped into the shoes of the Baltimore and Eastern Shore Railroad Company, with "all its rights, powers, privileges, immunities and franchises"—not with less.

The original company could certainly have claimed this privilege in respect to its steamboats and wharves as a part of its "property." No less claim must be conceded to its successor.

III.

Discussion of the case of State vs. County Commissioners of Wicomico County, decided by the Court of Appeals of Maryland, reported in 63 Atlantic Reporter, 678.

Counsel for the respondent is aware that since the institution of this cause of action and since the decision reached by the Circuit Court of Appeals herein a suit has been filed by the petitioners against the Baltimore, Chesapeake and Atlantic Railway Company and a decision secured from the Court of Appeals of Maryland, in which a construction is put upon Chapter 120 of the Acts of 1896 at variance with the argument hereinbefore submitted.

That serious consideration should be given to the construction of a State statute by the highest Court of that State, when Federal Courts are called upon to interpret the same statute must be conceded. The exigencies of sound legal conclusions

must alone warrant a variance between judgments arrived at by Courts whose powers in any field of investigation are co-ordinate. These reasons, apart from any question of courtesy, require an examination of the decision of the Court of Appeals of Maryland and the law relied upon to support its conclusion.

The Court, after re-affirming its decision in the earlier Maryland case, reported in 89 Maryland, page 89, that Sections 187 and following, of the Code of 1898 (being Sections 275 and following, Code 1904) did not confer immunity from taxation granted to the Baltimore and Eastern Shore Railroad Company by Chapter 133 of the Acts of 1886, upon the Baltimore, Chesapeake and Atlantic Railway Company, and which decision we have attempted to show is at variance with the decisions of this Court in construing similar stautes, further decides that the immunity from taxation granted the Baltimore and Eastern Shore Railroad by Chapter 133 of the Acts of 1886, was a mere bounty or gratuity creating no contract in the technical sense of that term and, therefore, presenting no federal question within Section 1, Clause 10, of the Constitution of the United States, which last conclusion, so far as the contention of this respondent for the purposes of this argument is concerned, may be conceded.

The Court then proceeds, page 683:

> "If, therefore, we concede for the sake of argument, that the present appellant acquired by virtue of its incorporation under section 187, etc. of Article 23 of the Code (1886) the same kind of an exemption as that possessed by the Baltimore and Eastern Shore Railroad Company, we find it in possession of a mere gratuity, which might at any time be recalled by the State, and which placed no restriction upon the subsequent exercise of the taxing power of the State.
>
> "Now in this state of the case we find that in 1896 the State by the general assessment law enacted in Chapter

120 of the Acts of 1896, positively directed a new assessment for the purposes of taxation to be make of all property in the State and taxes to be levied thereon.

"Section 2 of that Act declared that the property, real and personal of any railroad in the State shall be valued and assessed for county and municipal purposes, and later on in the Act directs appropriate officials to proceed to tax such property. This if not a final repeal, which it is not disputed the Statute could have made, of the legislation under which the appellant claims its exemption, certainly would have amounted to a recall of the exemption, if any such there were, within the ruling of the last cited Federal cases, especially of the case of the West Wisconsin Railroad Company vs. Supervisors. See also County Commissioners vs. Franklin Railroad Company 34 Md. 159."

By "the last cited Federal cases" it is presumed the learned Judge means Christ Church vs. Philadelphia, 65 U. S. 300; Tucker vs. Ferguson, 89 U. S. 575; West Wisconsin vs. Supervisors, 93 U. S. 595; Grand Lodge vs. New Orleans, 166 U. S. 149.

A careful consideration of these cases fails to disclose any one of them to be apposite citations for the repealing of a special law by a general law by implication. They are well recognized authorities on the question as to distinctions between legislative acts, which constitute contracts, and legislative acts, which are quasi contracts, concessions or bounties; so, also, it is admitted, is the citation of the case of County Commissioners vs. Franklin Railroad Company, 34 Md. 159, inapposite. That is indeed a case dealing with the repeal of *special* exemptions from taxation by *general* act, but the general act in this instance in its 33d section contains a clause expressly repealing all laws exempting property from valuation and was a distinct departure from the previous assessment law of 1852, Chapter 337, which contained no such provision.

See—County Commissioners vs. Franklin R. R. Co., 34 Md., page 163.

The well recognized rules of legislative construction bearing on the repeal of *special laws* by *general laws* receives no consideration at the hands of the Court, nor is the scope and effect of the legislation attempted by Chapter 120 of the Acts of 1896, examined with that particularity by the Court which, it is respectively submitted, should have been accorded such legislation, when the question under consideration was one seriously affecting property rights and values. The fact that the language of Section 2, quoted in the opinion, namely, that the property, real and personal of any railroad in the State shall be valued and assessed for county and municipal purposes appears word for word in Section 155 of Article 81 of the Code of 1888 is not adverted to by the Court, nor the unconstitutional aspects of this part of Section 2 passed upon.

In the earlier part of the opinion, the Court in referring to the general policy of the State with regard to local taxation of railroad property, says on page 681:

> "Furthermore this State has distinctly declared its policy with reference to local taxation of railroad property by legislative enactment which was in full force August, 1894, when the appellant was incorporated and still remains unrepealed. Section 155 of Article 81 of the Code of 1888 provides that the property real and personal of each and every railroad company in this State shall be assessed and taxed for county and municipal purposes in the same manner in which the property of individuals is now taxed. Even if the presence of Section 155 of the Statute had not made it inconsistent with the existing laws of the State so as to construe Section 187, etc., of Article 23 of the Code of 1888 as to make them operative and divest in the appellant by virtue of its incorporation under their provisions an exemption from taxation, such a construction would be in opposition to the well settled principle of law, to which we have already referred, governing the subject of exemption from taxation. The provisions of Section

187 did not become operative as to the appellant until it had accepted them by filing its certificate of incorporation and, therefore, for the purpose of ascertaining the extent of its powers and immunities, the law and paramount policy of the State as they existed at that time must be applied."

The fact that this Section 155 of Article 81 is to be found in Article 23 of Section 204 appears to have been overlooked by the learned Court, and also the fact that it was in force at the time the Baltimore and Eastern Shore Railroad Company was incorporated; at the time of the passage of Chapter 133 of the Acts of 1886 and at the time of the formation of the Baltimore, Chesapeake and Atlantic Railway Company in 1894. It is, therefore, submitted that in construing Sections 187 and following (Code 1888, being Sections 275, *et. seq.*, Code 1904) no inference as to the legislative policy of the State adverse to the contention of the respondent can possibly be drawn from the fact that Section 155 of Article 81 was in force as the Court points out.

Two other statements made by the learned Judge of the Court of Appeals of Maryland in this opinion require examination. The one, that Chapter 120 of the Acts of 1896 directs the appropriate officials to proceed to tax the real and personal property of every railroad in the State. (Page 683.) The language of the Act relied upon to support this contention is not quoted in the opinion, nor is the section referred to in which it can be found.

Diligence of counsel has not sufficed to discover any language in the Act that can be held to support this claim. The Assessors in their returns are required by Section 181 to *value* and *assess* all property, including property claimed to be exempt, and Section 182 provides that the County Commissioners acting as a Board of Control and Review, are "directed and required to examine carefully the several certificates, statements and returns

of valuations of property claimed to be exempted from valuation and assessment made by any assessors within their respective jurisdictions and to correct said returns of assessable property made to them," etc.

In compliance with the provisions of these sections it was the duty of the County Commissioners of Wicomico County to pass upon the exemptions asserted in behalf of the Baltimore, Chesapeake and Atlantic Railway Company. The claim in behalf of such exemption was recognized by the County Commissioners as valid and no attempt was made to tax the property of the Company under Chapter 120 of the Acts of 1896 until the year 1899. (Record, page 30.)

The second statement made in the opinion of the Court of Appeals of Maryland, to which attention is directed, is as follows (page 683):

> "It is a significant fact that in the last section of the Acts of 1896, Chapter 120, directing the general assessment, is found this proviso: 'Provided further, however, that nothing in this Act contained shall be held to discharge or release, impair or affect any irrepealable contract or obligation of any kind whatsoever existing at the date of the passage of this Act.'"

The inference which the Court seeks to convey is that inasmuch as only irrepealable contracts and obligations are specified in the Act, all repealable contracts and obligations are discharged and affected thereby.

Several answers to this point are suggested.

In the first place the language of the statute is ineffectual for any purpose. If a contract or obligation is irrepealable, it is manifestly beyond the power of the Legislature to deal with it, and hence a declaration by the Legislature that it does not intend to repeal such contracts and obligations can be of no significance from a legal point of view whatsoever.

Again, the learned Judge in the prior part of his opinion has decided that the immunity granted to the Baltimore and Eastern Shore Railroad Company *is not a contract but a concession or bounty*, and unless a concession or bounty can be defined as a "repealable obligation," and a plain intent on the part of the Legislature to repeal all "repealable obligations" discovered in the language employed, counsel is totally at a loss to know how this language can be held to repeal the immunity granted by Chapter 133 of the Acts of 1886.

It is submitted that no inference so remote and fanciful as this can be relied upon to repeal Chapter 133 of the Acts of 1886.

Had the Legislature intended to repeal such immunity, it would have been a very simple matter to have inserted the direct and unequivocal language which it inserted in the general assessment Act of 1876, which was the last general assessment Act preceding that of 1896.

In Section 2 of that Act (Act of Assembly 1876, Chapter 260), we find the following language:

> "All Acts or parts of Acts exempting any other property except that exempted by this Act from valuation, assessment or taxation for State, county or municipal purposes, which can be repealed by this General Assembly, are to the extent of such exemption, whenever or however the same has been heretofore granted, hereby expressly declared to be repealed to the extent of said exemption as aforesaid, and to be hereafter of no force or effect in granting such exemption."

It is contended, that with this language, which the Legislature had incorporated in the General Assessment Law of 1876, to guide them, far more significance is to be attached to its deliberate omission from the General Assessment Law of 1986, than the reference to irrepealable contracts and obligations referred to by the learned Court.

In conclusion, it may be conceded that a wise public policy decrees that claims in behalf of exemption from taxation should be closely scrutinized by Courts of Justice and every doubt resolved in favor of the power to tax.

The case at Bar does not, however, involve the question of the *power* to tax. It is admitted by this petitioner that the immunity granted by the Act of 1886, Chapter 133, can be recalled by the Legislature at will. In view of the power of the Legislature to thus declare its intention in language susceptible of no misconstruction, and in view of the opportunities in connection with such legislation, for a full and fair discussion by those interested, as to whether such exemption should be recalled, or left undisturbed, it is submitted that a judicial tribunal should not be diligent to conclude by its decree valuable rights which are properly the subject of deliberative action by a legislative body.

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Attorneys for Respondent.

Supreme Court of the United States.

No. 129.—October Term, 1906.

County Commissioners of Wicomico County
vs.
Samuel Bancroft, Jr.

Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

[November 5, 1906.]

Mr. Justice Day delivered the opinion of the Court.

The respondent, Samuel Bancroft, Jr., began an action in the Circuit Court of the United States for the District of Maryland to enjoin the county commissioners of Wicomico County from levying taxes on the property of the Baltimore, Chesapeake and Atlantic Railway Company, alleging that he was the holder of twenty bonds secured by mortgage upon the company's property, which, under the laws of the State, had been exempted from taxation. Such proceedings were had that a decree was entered enjoining taxation of certain property of the railway company. Upon appeal to the Circuit Court of Appeals, the judgment was affirmed, (135 Fed. Rep. 977,) and the case was brought here by writ of certiorari.

The case was tried upon an agreed statement of facts, from which the following, pertinent to the determination of the case, may be extracted: The Baltimore and Eastern Shore Railroad Company, organized to build a line of road from Eastern Bay, in Talbot County, to Salisbury, Wicomico County, in the same State, by act of the legislature of Maryland, was granted certain privileges, (Chapter 133, Acts of the Assembly, 1886,) sections 2, 4 and 5 being as follows:

"Sec. 2. *And be it enacted*, That said corporation shall have perpetual existence, and its franchises, property, shares of capital stocks and bonds shall be exempt from all State, county or municipal taxation for the term of thirty years, counting from the date of the completion of said road between the *termini* mentioned in its charter.

"Sec. 4. *And be it enacted*, That the said Baltimore and Eastern Shore Railroad Company aforesaid shall have power to unite, connect and consolidate with any railroad company or companies, either in or out of this State, so that the capital stock of said companies so united, connected and consolidated (respectively) may, at the pleasure of the directors, constitute a common stock, and the respective companies may thereafter constitute one company and be entitled to all the property, franchises, rights, privileges and immunities which each of them possess, have and enjoy under and by virtue of their respective charters.

"Sec. 5. *And be it enacted*, That the Baltimore and Eastern Shore Railroad Company shall have power to lease or purchase and operate any rail-

road or railroads, either in or out of this State, for the purpose of carrying on their business, and any other railroad company in this State shall have the right to lease or sell its railroad or other property to the said Baltimore and Eastern Shore Railroad Company."

The Baltimore and Eastern Shore Railroad Company accepted the provisions of the act and completed the construction of its road between the *termini* named in August, 1891. In June, 1890, it purchased the property of the Wicomico and Pocomoke Railroad Company, extending from Salisbury to Ocean City. Afterwards, the Baltimore and Eastern Shore Railroad Company mortgaged the entire property to secure $1,600,000 of mortgage bonds. This mortgage was foreclosed in 1894, and the purchaser proceeded to organize a new corporation, the Baltimore, Chesapeake and Atlantic Railway Company, the respondent becoming the holder of some of its mortgage bonds. This reorganization was under sections 187 and 188 of Art. 23, Maryland Code of 1888, which provide as follows:

Section 187, that in case of the sale of any railroad under foreclosure of mortgage, the purchaser may form a corporation for the purpose of owning, possessing, maintaining and operating such railroad, by filing in the office of the Secretary of State a certificate of the name and style of such corporation, the number of directors, etc.

"SEC. 188. Such corporation shall possess all the powers, rights, immunities, privileges and franchises in respect to such railroad, or the part thereof included in such certificate, and in respect to the real and personal property appertaining to the same which were possessed and enjoyed by the corporation which owned or held such railorad previous to such sale under or by virtue of its charter, and any amendments thereto, and of any other laws of this State," etc.

Under authority of the Maryland statutes the Baltimore, Chesapeake and Atlantic Railway Company issued the mortgage bonds of which respondent is the holder. The county commissioners of Wicomico County have levied and assessed taxes upon the railroad company's property, and threatened to sell the same for nonpayment thereof. The Circuit Court held, and the Circuit Court of Appeals affirmed the judgment, that sections 187 and 188 of the Maryland Code, extending immunities to the new company, had the effect to exempt from taxation certain property of the reorganized company, and that the exemption constituted a contract between the State and the company entitled to protection under the contract clause of the Federal Constitution, against the subsequent attempt of the county commissioners to levy taxes upon the property.

Notwithstanding this decision of the Circuit Court of Appeals, it is now conceded in the brief of the respondent's counsel, so far as this argument is concerned, that there was no binding contract upon the State entitled to protection under the Federal Constitution, (article 1, section 10,) against

State impairment of the obligation of the contract. In view of the provisions of the Maryland constitution this concession would seem in harmony with the right reserved in that instrument to amend, repeal and alter charters. (*Northern Central Railway Co.* v. *Maryland*, 187 U. S. 258.) And see *Wisconsin & Michigan Ry.* v. *Bowers*, (191 U. S. 379.) But it is insisted, conceding that the exemption from taxation was merely a bounty or gratuity, it extended to the reorganized company by force of the Maryland statutes above quoted, and has never been repealed nor withdrawn by the State, and, therefore, the bondholder, being directly interested in the property, has a right to be protected by injunction against the levying of such taxes so long as the act remains in force.

The questions arising in this case, as to the construction and force of the acts of the legislature of the State, have been before the Supreme Court of Maryland in three cases: *Baltimore, Chesapeake & Atlantic R. R. Co.* v. *Ocean City*, (89 Md. 89;) *Baltimore, Chesapeake & Atlantic R. R. Co.* v. *County Commissioners of Wicomico County*, (93 Md. 113;) and *Baltimore, Chesapeake & Atlantic R. R. Co.* v. *Wicomico County Commissioners*, (63 Atl. Rep. 678.) In these cases it was held that the exemption from taxation provided for by the laws above quoted did not extend to the reorganized company, and in the last case, decided March 27, 1906, since the decision in the Circuit Court of Appeals, it was held that the general assessment law of 1896, (Acts of 1896, Chap. 120,) declaring that the property of every railroad should be assessed for county and municipal purposes, and providing that nothing in the act should discharge or release any irrepealable contract or obligation existing at the date of the passage of the act, amounted to a recall of the immunity granted by the former law which had at all times been subject to repeal by the State, and that, conceding the immunity extended to the reorganized company under section 187 of the statute, the repeal of the exemption did not violate any contract with the State, entitled to the protection of the Federal Constitution.

As we have said, the argument addressed to this court is rested upon the proposition that the subsequent law of 1896, imposing taxes upon the property of the railroad company in general terms, did not repeal prior legislation, which, properly construed, gives the privilege of exemption from taxation to the property of the reorganized railroad company. We, therefore, are to consider a case wherein there is no contention that a valid and binding contract has been impaired by State action, and the questions are as to the proper construction of the statute, and whether a repealable exemption from taxation has been withdrawn by subsequent legislation of the State.

Previous decisions of this court have settled the proposition that whether such exemption has been in fact repealed by a subsequent State statute is

a question of State law in which the decisions of the highest courts of the State, in the absence of a contract, are binding; and that it is only where the exemption is irrepealable, thus constituting a contract, that it becomes the duty of this court to decide for itself whether the subsequent act did or did not impair the obligation of the contract. (*Gulf & Ship Island R. R. Co.* v. *Hewes*, 183 U. S. 66–74; *Northern Central R. R. Co.* v. *Maryland*, 187 U. S. 258, 266, 267.) It is contended, however, that inasmuch as the respondent acquired his bonds in 1896, which were issued in 1894, at a time when none of the Maryland decisions above referred to had been made, the first of them being in 1899, the construction of the statutes and their continued force are questions for the Federal courts having jurisdiction of the cause and the parties. And further, that while the Federal tribunals will differ reluctantly from the State courts upon a question of the validity of State statutes, and will "lean towards an agreement of views with the State courts," nevertheless they must in such cases exercise an independent judgment in determining the force and validity of State statutes. (*Burgess* v. *Seligman*, 107 U. S. 20, 23; *Great Southern Hotel Co.* v. *Jones*, 193 U. S. 532, and cases cited in the opinion in that case.)

If we could concede the soundness of this contention, we are of opinion that the Court of Appeals of Maryland was right in holding that the legislation of 1896, (Acts of 1896, Chap. 120) directing a new assessment of the property of the State and expressly declaring that the property of every railroad in the State should be valued and assessed for county and municipal purposes, had the effect to withdraw the prior exemption from taxation if a proper construction of the legislation of the State would extend it to the property of the reorganized company. The act contains the significant proviso that nothing therein contained shall be held to discharge, release, impair or affect any irrepealable contract or obligation of any kind whatsoever existing at the date of the passage of the act. This proviso evidences the legislative intent to repeal exemptions from taxation which were not protected by binding contracts beyond legislative control, if any such existed, and to bring all property within the taxing power of the State. We agree with the reasoning expressed by the Court of Appeals of Maryland upon this branch of the case. (63 Atl. Rep. 683.)

From this view it follows that the decree of the Circuit Court of Appeals must be reversed and the cause remanded to the Circuit Court with directions to dismiss the bill.

True copy.

Test:

Clerk Supreme Court, U. S.